88-899

No.

FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,**

*Petitioners,*

vs.

**WILLIE WILLIAMS, on behalf of himself and all others similarly situated,**

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Printed by Authority of the State of Illinois (P.O. 34286—55—11-23-88)

26 pp

## QUESTIONS PRESENTED

I. Whether the Constitution mandates that protective custody inmates be provided with programs and services that are fully equal to those provided for general population inmates.

II. Whether the Court of Appeals misapplied this Court's standard with regard to the defense of qualified immunity.

III. Whether the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure violates the principle of judicial deference to prison officials in the operation of their institutions.

## LIST OF PARTIES

The named petitioners were Michael Lane, director of the Illinois Department of Corrections since 1981; Richard DeRobertis, Stateville warden between July 1980 and November 1983; Michael O'Leary, Stateville warden after DeRobertis; Salvadore Goding, the assistant warden under both DeRobertis and O'Leary; Gayle Franzen, Department director from January 1979 to February 1981; Marvin Reed, warden from June 1979 to June 1980; and Lou Brewer, warden from September 1978 to June 1979.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 5 |
| I. | |
| THE CONSTITUTION DOES NOT MANDATE THAT PROTECTIVE CUSTODY INMATES BE PROVIDED WITH PROGRAMS AND SERVICES THAT ARE FULLY EQUAL TO THOSE PROVIDED TO GENERAL POPULATION INMATES | 6 |
| A. Introduction | 6 |
| B. The Court Of Appeals Misapplied This Court's Standard For Review Of Prison Policies | 8 |
| II. | |
| THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD WITH REGARD TO THE DEFENSE OF QUALIFIED IMMUNITY | 13 |

III.

THE APPOINTMENT OF A SPECIAL MASTER PURSUANT TO RULE 53 OF THE FEDERAL RULES OF CIVIL PROCEDURE VIOLATES THE PRINCIPLE OF JUDICIAL DEFERENCE TO PRISON OFFICIALS IN THE OPERATION OF THEIR INSTITUTIONS ..... 17

CONCLUSION ..... 19

APPENDIX

(Separate Volume)

A. Opinion of the United States Court of Appeals for the Seventh Circuit, June 27, 1988 ..... A-1

B. Order of the United States Court of Appeals for the Seventh Circuit Denying the Petition for Rehearing and Suggestion of Rehearing En Banc, August 29, 1988 ..... B-1

C. Final Injunctive Order of the United States District Court for the Northern District of Illinois, Eastern Division, August 31, 1987 ..... C-1

D. Memorandum Opinion and Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, October 21, 1986 ..... D-1

E. Excerpts from the Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *Shango v. Jurich* (Judge Ann C. Williams), July 15, 1988 ..... E-1

## TABLE OF AUTHORITIES


| *Cases* | PAGE(S) |
|---|---|
| *Abel v. Miller*, 824 F.2d 1522 (7th Cir. 1987) .. | 15 |
| *Anderson v. Creighton*, ___ U.S. ____, 107 S. Ct. 3034 (1987) ..... | 14 |
| *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986) .. | 15 |
| *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977) ..... | 15, 16 |
| *Cody v. Hillard*, 799 F.2d 447 (8th Cir. 1986) ... | 10 |
| *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079 (1972) . | 15 |
| *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985) .. | 8, 9 |
| *Gary W. v. Louisiana*, 601 F.2d 240 (5th Cir. 1979) . | 18 |
| *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982) ..... | 14 |
| *LaBuy v. Howes Leather*, 352 U.S. 249, 77 S. Ct. 309 (1957) ..... | 17, 19 |
| *Mitchell v. Forsyth*, ____ U.S. ____, 105 S. Ct. 2806 (1985) ..... | 2, 14 |
| *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S. Ct. 2400 (1987) ..... | 6, 7, 8 |
| *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800 (1974) ..... | 17, 18 |
| *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1348 .... | 18 |
| *Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986) .. | 9, 10 |
| *Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254 (1987) ..... | 6, 7 |

*Statutes*

28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 1291 ..... 2
28 U.S.C. § 1292(a) ..... 2
28 U.S.C. § 1331 ..... 2
28 U.S.C. § 1343 ..... 2
42 U.S.C. § 1983 ..... 2, 3

*Other Authorities*

Fed. R. Civ. Pro. 53 ..... 4, 17

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*Petitioners,*

vs.

**WILLIE WILLIAMS, on behalf of himself and all others similarly situated,**

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Michael Lane, Michael O'Leary and Richard DeRobertis, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 27, 1988.

## OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 851 F.2d 867 (7th Cir. 1988) and is attached as an Appendix (App. A). The order denying the petition

for rehearing and suggestion for rehearing en banc was entered by the Court of Appeals on August 29, 1988 and is attached as an Appendix (App. B). The injunctive order and the memorandum opinion of the United States District Court for the Northern District of Illinois, issued on August 31, 1987, and October 30, 1986, respectively are also attached as Appendices (App. C & D).

## JURISDICTION

The basis for jurisdiction in the district court was the existence of a federal question based on the First, Eighth, and Fourteenth Amendments to the United States Constitution and Title 28 U.S.C. §§ 1331, 1343, and Title 42 U.S.C. § 1983. Under Title 28 U.S.C. § 1292(a)(1), the Court of Appeals had jurisdiction in appeal no. 87-2436 to review the injunctive order of the district court entered on August 31, 1987. The Court of Appeals also had jurisdiction in appeal no. 86-2922 to review that portion of the district court's October 21, 1986 memorandum opinion denying defendants' defense of justified immunity, with respect to an award of damages. An order denying the defense of qualified immunity is considered to be a final order under Title 28 U.S.C. § 1291 and immediately appealable. *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815-2816 (1985). By agreement, briefing on this appeal was stayed until the district court entered an injunctive order in this case which it did on August 31, 1987. Appeal nos. 87-2436 and 86-2922 subsequently were consolidated by the Court of Appeals. The Court of Appeals entered its opinion on June 27, 1988, and denied the petition for rehearing on August 29, 1988. Jurisdiction in this Court vests under Title 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

### 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress.

## STATEMENT OF THE CASE

This case is a class action brought pursuant to Title 42 U.S.C. § 1983 by inmates incarcerated in the protective custody unit at the Stateville Correctional Center, a maximum security prison operated by the Illinois Department of Corrections. In their complaint, respondents sought injunctive relief and monetary damages against the petitioners, who are past and present administrators of Stateville and of the Illinois Department of Corrections. The respondents claimed that the petitioners had violated their constitutional rights by failing to provide them with equal access to the programs and services offered to general population inmates at Stateville. More specifically, the respondents alleged that the petitioners had denied them regular access to religious services and the law library, as well as subjecting them to substandard food, housing conditions, and job and educational programs in violation of the First, Fourteenth and Eighth Amendments to the Constitution.

After a bench trial on the merits, the district court issued an 80-page memorandum opinion finding that the respondents' constitutional rights had been violated and that they were entitled to injunctive relief. In its opinion, the court ordered petitioners to submit a proposed injunctive order remedying these constitutional violations. The court also ruled that the petitioners were not entitled to the defense of qualified immunity and that, therefore, an award of compensatory, and perhaps punitive, damages would be proper. The petitioners filed a notice of appeal from the denial of qualified immunity. Briefing on this appeal was stayed by agreement until the district court's entry of a final injunctive order.

After considering several proposed orders submitted by both parties, the district court entered a final injunctive order requiring the petitioners to "expeditiously adopt and implement policies and procedures for the operation of Stateville that shall at a minimum provide plaintiffs [respondents] with programs, housing accommodations and services comparable to those provided to Stateville's general population inmates, consistent with the opinion's findings and recommendations." The court further stated "to that end, if Defendants [petitioners] do not furnish fully *equal* provisions to plaintiffs in any respect in the course of complying with their duty to furnish comparable provisions, defendants shall promptly file reports with this Court identifying (a) such inequality and (b) the bona fide security considerations necessitating such inequal treatment." In addition, the court stated that it would "promptly appoint a special master pursuant to Rule 53 to monitor compliance with and implementation of the relief ordered in this case in keeping with the opinion's findings and conclusions. Pursuant to Rule 53 and as will be provided in an order of reference, all necessary expenses for carry-

ing out the special master's duties shall be charged upon Defendants." (App. C, p. 2) The petitioners filed a notice of appeal from this order. This appeal then was consolidated with the appeal of the district court's earlier order denying qualified immunity to the petitioners.

The Court of Appeals for the Seventh Circuit affirmed and ruled that the petitioners had violated the constitutional rights of the respondents. Essentially, the panel upheld the district court's ruling that the record failed to demonstrate security justifications sufficient to rationalize the restrictions placed on protective custody inmates' access to programs and services, and that the petitioners must provide protective custody inmates with programs and services equal to those provided to general population inmates. The court also ruled that the petitioners were not entitled to qualified immunity and that the appointment of a special master to oversee the implementation of the decision was properly within the authority of the district court.

## REASONS FOR GRANTING THE WRIT

Whether the Constitution requires the provision of programs and services to protective custody inmates that are fully equal to those provided to general population inmates is a question of first impression in this Court. The Court of Appeals' decision mandates "constitutional" relief that has never been required by any decision of this Court and conflicts with a decision of its own Circuit as well as with another Circuit Court of Appeals. In addition, it strips prison officials of the defense of qualified immunity, disregarding the standards established by this Court,

and will subject the petitioners to thousands of individual damage claims. Finally, the decision approves the appointment of a special master to oversee the implementation of the district court's order in violation of a basic principle of law enunciated by this Court; that is, deference to prison officials in the operation of their institutions. The appointment of a special master allows the court to make important decisions regarding security and the allocation of prison resources, which had heretofore been made only by prison administrators. This decision by the Court of Appeals and its use of inappropriate legal standards will have a significant and detrimental impact on the operation of penal institutions by petitioners and other correctional officers throughout the country. For these reasons, the petitioners pray that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals.

## I.

## THE CONSTITUTION DOES NOT MANDATE THAT PROTECTIVE CUSTODY INMATES BE PROVIDED WITH PROGRAMS AND SERVICES THAT ARE FULLY EQUAL TO THOSE PROVIDED TO GENERAL POPULATION INMATES.

### A. Introduction.

In its decision, the Court of Appeals panel recognized that the standard to determine the constitutionality of the restrictions at issue is the test articulated by this Court in *Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254 (1987) and *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S. Ct. 2400 (1987). Petitioners submit, however, that the panel's decision did not properly apply the *Turner-O'Lone* standard in ruling that the restrictions imposed on programming for protective custody inmates were unconstitutional.

In the *Turner* and *O'Lone* cases, this court identified four factors that must be weighed in judging the constitutionality of a prison regulation. The first requirement is that the regulation have a valid, rational connection to a legitimate penological interest. To prove the absence of such a connection, it must be shown that the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or "irrational." *Turner*, 197 S. Ct. at 2262. The second factor is whether "alternative means of exercising the right remain open to prison inmates." *Id.* at 2262. Third, an assessment must be made of "the impact accommodation of the asserted constitutional rights will have on guards . . . other inmates, and . . . prison resources generally." If such a "ripple effect" exists, particular deference must be accorded to prison officials. *Id.* Finally, the absence of "ready alternatives is evidence of the reasonableness of a regulation. . . . This is not a 'least restrictive' test: prison officials do not have to set up and then shoot down every conceivable alternative. . . ." *Id.* The Court stated that to be considered, an alternative would have to fully accommodate the prisoner's right at a *de minimus* cost to valid penological interests. *Turner*, 107 S. Ct. at 2262. Employing these factors, the Court in *O'Lone* upheld a restriction which absolutely prevented Muslim inmates assigned to an outside work detail from attending weekly Jumuáh, the central communal service of the Muslim religion. The Court ruled that the absolute restriction of this once-a-week movement of general population prisoners was logically related to prison security and orderly administration. *O'Lone*, 107 S. Ct. at 2405.

**B. The Court Of Appeals Misapplied This Court's Standard For Review Of Prison Policies.**

This test and the decision reached by this Court in *O'Lone* cannot be reconciled with the conclusion of the Court of Appeals in the instant case which found *no* logical connection between restricting the programming of protective custody inmates and the security of these inmates. The petitioners submit that this conclusion is clearly erroneous, regardless of any credibility findings made by the district court, since there is compelling evidence in the record which reflects a logical relationship between the restriction of protective custody movements and security, the most fundamental of penological objectives.

It is undeniable that there exists a rational basis between restricting the access of protective custody inmates to programs and the security of these inmates. Not only does the decision of the Court of Appeals in the instant case not credit this principle, but it also conflicts with another decision within the Circuit. In *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), four inmates at an Indiana prison filed a class action suit complaining of constitutional violations with regard to conditions at the prison. One of these allegations was that those prisoners who were confined in protective custody did not have equal access to the same vocational, academic and rehabilitative programs as those in the general prison population. The district court in *French* ruled that providing access to programs to general population inmates and denying them to inmates in protective custody was a violation of the Equal Protection Clause of the Fourteenth Amendment. It concluded that treating protective custody inmates differently than those in general population did not have any rational

basis, especially when the state had created conditions necessitating the widespread use of protective custody. On appeal, the Seventh Circuit reversed, stating that security reasons justified limiting the access of prisoners in protective custody to the programs and services offered to the general population:

> Protective segregation is offered to inmates for their safety, the safety of others in confinement, and to insure institutional security and order. To allow prisoners in protective custody to enjoy all the same privileges to the same degree as those in the general population would eviscerate the nature of protective segregation. Because the difference in treatment among prisoners in protective segregation and the general population has a substantial rational basis in the legitimate state interest of prison security, we hold that . . . rights to equal protection have not been abridged.

777 F.2d at 1256 (quoting *Allgood v. Morris*, 724 F.2d 1098, 1100-1101 (4th Cir. 1984).

The Court of Appeals ruling in the instant case also conflicts with a decision of the Fourth Circuit Court of Appeals. In *Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986), the plaintiffs alleged that, as protective custody inmates in a North Carolina prison, they were denied equal access to religious services, the library, recreational programs, jobs and rehabilitative programs. The defendants did not dispute these differences, but contended that they stemmed from security considerations. The Fourth Circuit ruled that less favorable conditions imposed on prison inmates requesting protective custody do not violate the inmates' equal protection or due process rights where the restrictions bear a rational relationship to the protection of the prisoners requesting such relief and where the restrictions

are not so onerous as to jeopardize their health. 781 F.2d at 1050.

In the instant case, trial testimony disclosed that the access to services which is provided to Stateville's protective custody inmates is consistent with contemporary correctional practices. (Vol. 10-A, pp. 24-25) In fact, Stateville is one of a relatively small number of maximum security institutions which is accredited by the American Correctional Association (ACA). One of the requirements for accreditation is a showing that protective custody inmates have been given adequate access to religious, library and other services. (Vol. 10-A, p. 38) *See Cody v. Hillard*, 799 F.2d 447, 451 (8th Cir. 1986), where ACA guidelines were relevant in determining an Eighth Amendment claim. Furthermore, in determining reasonableness, the fact remains that while prison officials may differ on the exact balance to be drawn between access to programs and services and the restriction of movement of protective custody inmates for safety reasons, no prison in this country has ever provided its protective custody inmates with the *fully equal* programs and services demanded by the Court of Appeals in the instant case.

There are several reasons for this disparity in programs and services. First, protective custody is considered to be a temporary status. At trial, Judith Pederson, a caseworker supervisor at Stateville since 1984, testified that 90 percent of the inmates in the protective custody unit at Stateville stay less than one year and 20 percent stay less tha one month. (Vol. 7-B, p. 240) Michael Huff, also a caseworker at Stateville, testified that the average stay in protective custody is less than six months and that no more than 30 to 40 inmates at Stateville have been in protective custody for a substantial length of time. (Vol.

7-A, pp. 209-10) It should be noted that neither Pederson's nor Huff's testimony was discredited by the district court in its memorandum opinion. In addition to the temporary nature of protective custody, this Court can take note of the extremely violent inmate population at Stateville, (Vol. 7-A, p. 6; Vol. 10-B, p. 109), and the fact that all protective custody placements are made at the request of the inmates themselves. (Vol. 7-B, p. 203) The petitioners submit that in light of these three factors, there exists a rational basis for the restrictions on protective custody programming at Stateville.

The Court of Appeals decision also failed to apply the other *Turner-O'Lone* factors in a manner consistent with this Court's direction. In its opinion, the panel brushed aside the fact that the petitioners have afforded protective custody inmates alternative ways to exercise their restricted rights, particularly in the areas of religion and access to the law library. Similarly disregarded was the substantial financial burden that the trial court's order will impose on the State of Illinois. The recognized class in the case includes over one thousand inmates, and the relief ordered by the district court in its final injunctive order will include not only individual awards of damages to these inmates, but a total restructuring of protective custody programs and services.

It should be noted that securing these funds will jeopardize money available for programming, security, facilities, and services provided to those state prisoners who are not confined to protective custody. Compliance with the court's order will require the petitioners to request supplemental appropriations from the legislature, renovate existing structures or possibly construct additional structures, prepare staffing and utilization studies, and hire and

train additional staff. These alternatives are hardly the type which "fully accommodate the prisoner's right at *de minimus* cost to valid penological interests", as was contemplated by this Court in the *Turner* and *O'Lone* cases. All of the options proposed by petitioners to achieve compliance will have substantial "ripple effects" on guards, other inmates, and prison resources generally, in violation of the standards set out in these cases.

Finally, in spite of the district court's discrediting of the testimony of Wardens O'Leary and DeRobertis, the fact remains that the implementation of the district court's order will pose a substantial risk to the safety and security of protective custody inmates. At trial, Assistant Superintendent Travis Wheaton and A. C. Parke, a consultant for the Commission for Accreditation, testified that restrictions on the out-of-cell movements of protective custody inmates, as well as limitations on the numbers of these inmates moved at any one time, are the chief means used by administrators to safeguard these inmates from the general population and each other. (Vol. 8-B, pp. 128-129; Vol. 10-A, p. 49) For this reason, Parke stated, he did not know of any prison that offered protective custody inmates programs and services fully equal to those offered the general population. (Vol. 10-A, p. 52) In addition, if Stateville were to offer programs for protective custody inmates at night (as may be required if the district court order is implemented) this would greatly increase the risk of escape, render supervision by the guard tower more difficult, and increase the possibility of violence. (Defendant's Response to Plaintiff's Proposed Order) Finally, given the complex time schedules and space constraints of Stateville (which houses some 2,000 inmates, only 300 of which are in protective custody), increasing protective

custody programs will of necessity disadvantage the remainder of the population, as well as place additional burdens on the Stateville security personnel.

In considering whether to grant this petition, this Court should note that there is an overriding public interest in the proper resolution of the legal issues presented by this case. Stateville is only one of many maximum security institutions in this country, and the opinions of the district court and the Court of Appeals raise issues of equal programming and services that will invite litigation from thousands of protective custody inmates in other institutions who wish to be accorded similar treatment.

## II.

## THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARDS WITH RESPECT TO THE DEFENSE OF QUALIFIED IMMUNITY.

In its memorandum opinion, the district court ruled that the respondents had established a right to awards of compensatory and perhaps punitive damages:

> 13. Plaintiffs have also established the predicate for an award of compensatory damages. Although no award may be made for defendants' denials of constitutional rights as such . . . they are entitled to damages for injuries that can be measured in monetary terms: (a) pain, suffering, and mental anguish already suffered and proximately caused by defendant's unlawful actions; (b) pain, suffering and mental anguish reasonably certain to be suffered in the future from the same causes; and (c) back pay . . . for lost wages from defendants' failure to provide plaintiffs with opportunities to have jobs or participate in educational or vocational programs, as

> well as for the impairment of their earning capabilities.
>
> . . . . .
>
> 15. In addition to actual damages, the law permits an award of punitive and exemplary damages to punish egregious violations of constitutional rights and to serve as a warning to others not to engage in such conduct. Such damages are recoverable "if the defendants' conduct involves reckless or callous indifference to the plaintiff's rights, or if the action is motivated by evil intent.' . . . Because neither plaintiffs' nor defendants' counsel have focused fully on just which defendants are and which are not liable for such damages and on the amount of such liability, final entry of such award will await further submissions by the parties. (citations omitted) (App. D, pp. 60-61)

The petitioners submit that the district court erred and that they are immune from awards of monetary damages through the application of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738 (1982), this Court held that government officials generally are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *See also Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987). In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 816 (1985), the Supreme Court stated that, when reviewing a denial of a claim of qualified immunity, the appellate court must decide only a question of law; namely, "whether the legal norms allegedly violated by the defendant were *clearly established* at the time of the challenged actions." (emphasis supplied) 473 U.S. at 511.

In affirming the district court's decision on this issue, the Court of Appeals not only misapplied this standard,

but also ignored the standards articulated by its own circuit in earlier decisions. The Seventh Circuit has given great weight to the need to protect defendant public officials in assessing qualified immunity claims. For example, in *Benson v. Allphin*, 786 F.2d 268, 272 (7th Cir. 1986), the court concluded that "whenever a balancing of interests is required, the *facts* of the existing case law *must closely correspond* to the contested action before a defendant official is subject to liability." (emphasis supplied) Similarly, in *Abel v. Miller*, 824 F.2d 1522, 1533 (7th Cir. 1987), the court stated that "[t]o determine whether such legal claims existed at the pertinent time, we often refer to closely analogous cases decided before the public officials acted or failed to act."

In denying the petitioners qualified immunity, the district court in the instant case relied on Supreme Court cases which established general constitutional rights for prisoners, such as access to the courts or free exercise of religion. Cases such as *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977) and *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079 (1972) in establishing these rights, however, did not set up any specific mandates but rather general guidelines for prison officials to follow. In the *Bounds* case, this Court ruled that prison inmates have a constitutional right of access to the courts which "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." (emphasis supplied) 97 S. Ct. at 1498. After discussing several alternative methods of satisfying this constitutional right, this Court stated that "a legal access program need not include any particular elements we have discussed and *we encourage local experimentation*." *Id.* at 1500 (emphasis supplied). The real

test as to whether this obligation has been met, the Court concluded, is whether the plan gives "prisoners a reasonably adequate opportunity to present claimed violations of fundamental rights to the courts." *Id.* at 1496.* In the *Cruz* case, this Court found that the state had failed to provide the plaintiff with reasonable opportunities to exercise his Buddhist religion, retaliated against him by placing him in solitary confinement, and prohibited him from corresponding with his Buddhist religious advisor, in violation of his right of free exercise of religion. 92 S. Ct. at 1080. The Court did *not*, however, conclude that inmates must receive communal religious services, religious instruction or private religious counseling, as did the district court in this case.

Nor did this Court consider, in either the *Bounds* or *Cruz* cases, the rights of protective custody inmates vis-a-vis general population inmates in light of the special security needs of the protective custody inmates. In fact, as discussed in Argument I, no court has ever ruled that the equal protection clause requires that protective custody inmates must be provided with programs and services fully equal to those provided to general population inmates, as the Court of Appeals has done in this case. Thus, petitioners urge this Court to address these issues in order to provide guidance to prison officials throughout the country.

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* In a case tried simultaneously with the instant case in the Northern District of Illinois, Judge Anne Williams took note of the district court decision in this case but ruled that the access to the law library at Stateville as a whole was constitutionally adequate under *Bounds*. *See Shango v. Jurich* (slip op. decided July 15, 1988). (App. E, pp. 1-15)

## III.

## THE APPOINTMENT OF A SPECIAL MASTER PURSUANT TO RULE 53 OF THE FEDERAL RULES OF CIVIL PROCEDURE VIOLATES THE PRINCIPLE OF JUDICIAL DEFERENCE TO PRISON OFFICIALS IN THE OPERATION OF THEIR INSTITUTIONS AND IS NOT WARRANTED BY THE FACTS OF THIS CASE.

The district court's final injunctive order required the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure to monitor "implementation of the relief ordered in this case in keeping with the opinion's findings and conclusions." (App. C, p. 5) Rule 53(b) provides, however, that a court must appoint a special master "only upon a showing that some exceptional condition required" this appointment. In its opinion, the Court of Appeals acknowledged that a district judge's authority to make a referral under Rule 53, if not consented to by the parties, is limited, *LaBuy v. Howes Leather*, 352 U.S. 249, 77 S. Ct. 309 (1957), but stated that "appointing a special master directed to supervise and coordinate the actions of prison officials to effectuate full compliance is especially appropriate for cases such as this challenging conditions of confinement." (App. A, p. 28)

The petitioners submit, however, that the appointment of a special master in this case violates a fundamental principle of law enunciated by this Court in prisoners' rights cases; that is, judicial deference to prison administrators in the operation of their institutions. Because of this, petitioners contend that they must be able to direct any implementation of the district court's order. As this Court stated in *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 1807 (1974), the solutions to problems of prison reform "require expertise, comprehensive planning and the commitment of resources, all of which are peculiar-

ly within the province of the legislative and executive branches of government." The Court also noted that "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Id.*

The Court of Appeals attempted to justify the appointment of the special master by stating that the petitioners' had failed to comply with the district court's memorandum opinion, and that "Judge Shadur cannot be expected to neglect his busy schedule to ensure that the recalcitrant defendants no longer violate the basic rights of this class." (App. A, p. 28)

In the instant case, petitioners contend that there has not been a showing of any actions on the part of petitioners failing to comply with an order of the district court to remedy any specific condition at Stateville. The district court's findings of noncompliance and intransigence center instead on the failure of petitioners to submit proposals *acceptable to the district court.* These findings are not sufficient to support the extraordinary relief of appointment of a special master.

Furthermore, the cases cited by the Court of Appeals as authority for the appointment of a special master are factually very different from the instant case. In *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1348, the Court of Appeals, in upholding appointment of a special master, noted several factors in addition to lack of cooperation by defendants as the basis for appointment. Those factors included the difficulty in supervising a comprehensive plan applying to the entire Texas prison system and noncompliance with court orders. In *Gary W. v. State of Louisiana*, 601 F.2d 240 (5th Cir. 1979), also cited with approval by the

panel as supporting the appointment of a master, petitioners had allegedly been in noncompliance with a court for a period of two years.

Finally, while the panel noted Judge Shadur's congested docket as a basis for appointment of a master, that basis was explicitly rejected in *LaBuy v. Howes Leather*, 354 U.S. 249, 77 S. Ct. 309 (1957). Thus, it appears that the appointment of a special master cannot be sustained by either the case law or the facts of this case.

## CONCLUSION

For the foregoing reasons, the petitioners respectfully request this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 28 1988
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CLERK

No. 88-899

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,**

*Petitioners,*

vs.

**WILLIE WILLIAMS, on behalf of himself and all others similarly situated,**

*Respondents.*

## APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Printed by Authority of the State of Illinois (P.O. 34287—55—11-23-88)

## INDEX TO APPENDIX


PAGE

A. Opinion of the United States Court of Appeals for the Seventh Circuit, June 27, 1988 ..... A-1

B. Order of the United States Court of Appeals for the Seventh Circuit Denying the Petition for Rehearing and Suggestion of Rehearing En Banc, August 29, 1988 ..... B-1

C. Final Injunctive Order of the United States District Court for the Northern District of Illinois, Eastern Division, August 31, 1987 ..... C-1

D. Memorandum Opinion and Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, October 21, 1986 ..... D-1

E. Excerpts from the Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, in the case of *Shango v. Jurich* (Judge Ann C. Williams), July 15, 1988 ..... E-1

In The

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*Respondents.*

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## APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 86-2922 and 87-2436

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

*Plaintiffs-Appellees,*

*v.*

MICHAEL P. LANE, Director of the Illinois Department of Corrections, et al.,

*Defendants-Appellants.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 355—**Milton I. Shadur,** *Judge.*

ARGUED DECEMBER 9, 1987—DECIDED JUNE 27, 1988

Before CUMMINGS and FLAUM, *Circuit Judges*, and GRANT, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* While lawful imprisonment does deprive convicted prisoners of many rights, *Hudson v. Palmer*, 468 U.S. 517, 524, inmates still retain limited constitutional protection including the First Amendment right to free exercise of religion, *Cruz v. Beto*, 405 U.S. 319, 322 n.2, the right of access to courts, *Bounds v. Smith*, 430 U.S. 817, 821, the right to due process restricted only by the nature of the penal system, *Wolff*

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

*v. McDonnell*, 418 U.S. 539, 556, and the right to equal protection under the laws. *Lee v. Washington*, 390 U.S. 333, 333-334. Federal courts, while most reluctant to interfere with the internal administration of state prisons, see, *e.g.*, *Block v. Rutherford*, 468 U.S. 576, 584-585, nevertheless will intervene to remedy unjustified violations of those rights retained by prisoners, especially when faced with inadequate compliance by prison officials with prior court orders.

Recent decisions of the Supreme Court indicate a reevaluation of the role of federal courts in state prisoner cases. In *Bell v. Wolfish*, 441 U.S. 520, the Court described the change from a "hands-off" approach to a period when federal courts "waded into this complex arena" to a withdrawal of the federal courts from the "minutiae of prison operations":

> There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however,

> that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confined to officials outside of the Judicial Branch of Government.

*Bell*, 441 U.S. at 562; see also *O'Lone v. Estate of Shabazz*, 107 S. Ct. 2400; *Turner v. Safley*, 107 S. Ct. 2254; *Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988), certiorari denied, 56 L.W. 3846. It is in this context that we review the relief granted by the district court to those inmates assigned to protective custody status[1] at the Stateville Correctional Center in Illinois.[2]

*Factual Background*

Due to the comprehensive nature of the district court's decree, the extensive record in this case must be examined in detail. See *Williams v. Lane*, 646 F. Supp. 1379 (N.D. Ill. 1986). In reviewing the case on appeal, we recognize the deference owed to the trial court's findings of fact. Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *Anderson v. City of Bessemer City*, 470 U.S. 564, the Supreme Court stated that " '[a] finding is "clear-

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[1] Protective custody is a status available to a Stateville inmate when he fears for his safety or when the warden believes the inmate's safety may be in jeopardy. At any one time, from 200 to 300 of the inmates at Stateville are in protective custody.

[2] Stateville is a maximum security prison run by the defendants which houses approximately 2,000 inmates within five cellhouses. Inmates serve time for violent crimes such as murder and Class X felonies. Stateville has been the subject of recent litigation before this Court. See, *e.g.*, *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988); *Williams v. Boles*, 841 F.2d 181 (7th Cir. 1988); *Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988), certiorari denied, 56 L.W. 3846.

ly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Id.* at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395); *In re: Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 840 F.2d 1308 (7th Cir. 1988). A reviewing court may not reject a factual finding simply because it disagrees with the trier of fact. *Id.* Further, a reviewing court must show even greater deference to the trial court's findings that involve credibility of witnesses, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575; see also *Bullard v. Sercon Corp.*, No. 87-2184, slip op. at 3 (7th Cir. May 13, 1988).

This Court recently applied the rule to a prisoners' civil rights claim in *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987), where in the context of the prison officials' position on the interests of security, we held that "the district court's finding on this point is one of fact which we must accept unless it is clearly erroneous." *Id.* at 784.

The defendants in this case waited until their reply brief before articulating their view of the proper scope of review regarding the district court's factual findings. In their reply brief, defendants offer in a conclusory fashion various examples of what they consider clearly erroneous findings of facts on the security concerns of the prison officials. These unpersuasive arguments are really a thinly-guised attack on the credibility determinations of Judge Shadur, which "can virtually never be clear error." *Anderson*, 564 U.S. at 575. Based on both the demeanor of the witnesses and the substantial record evidence, the district court held that the defendants' security explanations were "not credible as a factual matter." Defendants now rely almost completely on the discredited testimony of defendants DeRobertis and O'Leary while also insisting that the court failed to allow them the deference they deserve as prison administrators.

As an initial matter, we reject these excuses. The district court quite properly refused to accept defendants' testimony because it conflicted with the objective factual record. The inconsistencies and contradictions in their statements were adjudged "frankly unworthy of belief." Moreover, a court's "deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute." *Campbell v. Miller*, 787 F.2d 217, 227 n.17 (7th Cir. 1986), certiorari denied, 107 S. Ct. 673. In this case, in contrast to *O'Lone* and *Turner*, the defendants failed to establish a record which revealed the manner in which security considerations were seriously implicated by the unequal treatment afforded to protective custody status inmates. See *Caldwell v. Miller*, 790 F.2d 589, 597 (7th Cir. 1986). Defendants have confused deference with credibility in their arguments here. The record of the proceedings below shows that the district court did not second-guess the administrator's determination. Rather, the court weighed the evidence and carefully considered what was argued before it by defendants.

Having discussed the relevant standard of review, it is now appropriate to turn to the history of plaintiffs' action. This case concerns a prisoner's civil rights class action suit for both injunctive relief and damages under 42 U.S.C. § 1983 and Illinois state law. The plaintiffs are inmates at Stateville Correctional Center near Joliet, Illinois, and the class representative is Willie Williams, who was incarcerated in the prison's protective custody unit from November 1977 to October 1983. The plaintiff class consists of all inmates assigned to protective custody at Stateville since April 30, 1982. The plaintiffs allege that their rights have been violated due in part to the living conditions and institutional programs assigned to them by the defendants.

The defendants are state prison officials sued in their individual capacities for acts taken under color of state law. Principal defendants include Michael Lane, director of the Illinois Department of Corrections (Department)

since 1981; Richard DeRobertis, Stateville warden between July 1980 and November 1983; Michael O'Leary, Stateville warden after DeRobertis; Salvadore Goding, the assistant warden under both DeRobertis and O'Leary; Gayle Franzen, Department director from January 1979 to February 1981; Marvin Reed, warden from June 1979 to June 1980; and Lou Brewer, warden from September 1978 to June 1979.

The plaintiffs basically claimed that the defendants violated these protective custody prisoners' constitutional rights by failing to provide them with access to the same programs and services offered the general population inmates at Stateville. Specifically, this included denial of (1) their free exercise of religion, (2) meaningful access to the courts, (3) freedom from cruel and unusual punishment, and (4) their rights to due process and equal protection by failing to provide comparable programming and living conditions. Plaintiffs also alleged that defendants violated state law by not following the requirements of Administrative Regulation 808 ("A.R. 808"), adopted by the Department in 1976, which, besides creating a protective custody unit in each maximum security prison, mandates that "[h]ousing and programmatic accommodations shall be comparable to those provided for the general population." A.R. 808 was revised in 1982 to allow for the implementation of the consent decree entered in *Meeks v. Lane*, 75 C 96 (three-judge district court, N.D. Ill. 1981), and reproduced in the plaintiffs' Appendix. This decree required, *inter alia*, that defendants provide inmates in protective custody "with the same opportunities as other inmates in other housing areas of the general population for . . . job assignments, vocational and educational assignments, recreation, access to prison libraries, access to religious services and to all other institutional programs."[3]

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[3] The *Meeks* decree further required that the defendants provide all inmates in the protective custody area: (1) "the opportunity

(Footnote continued on following page)

To understand the nature of this case, it is first necessary to describe the protective custody status available in Stateville through the programs and living conditions which consist of religious counseling, library services, educational and occupational instruction, recreational opportunities, and food service. As seen, assignment to protective custody status (see n.1 *supra*) was initially provided for by A.R. 808. This status is not made for disciplinary reasons; rather inmates are placed in protective custody for their own safety. It is truly neither "voluntary" nor "temporary": the Department has to substantiate the identifiable threat and approve the placement, and for their own protection inmates may spend much of their sentence in protective custody.

Until January 1979, all protective custody inmates in Stateville were assigned to Cellhouse E. After the Department locked down Stateville in early 1979,[4] all residents with this status were moved to Cellhouse B-West and housed with the disciplinary segregation inmates who had

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[3] *continued*

to attend a communal religious service outside their cells once per week"; (2) "access to the general library at least one hour per week, and to the prison law library for at least four hours per week"; (3) "law clerks . . . to do research and obtain copies" and "library clerks who will circulate within the unit on a daily basis"; (4) "educational opportunities commensurate with those available to inmates in the general population," including "college credit courses"; (5) "job opportunities"; (6) at least "seven hours per week of out-of-cell recreation" (and a good faith effort to provide more); and (7) "food of comparable quality, quantity, and temperature as that provided to inmates assigned to general population" (and a good faith effort "to locate an area [in Stateville] suitable for use as a protective custody dining area").

Revised A.R. 808 stated that "[h]ousing arrangements and essential services shall be comparable to those provided for the general population." The district court found that "comparable" as used in A.R. 808 means "equivalent" or "equal in value or extent" (646 F. Supp. at 1335).

[4] Lockdown is locking all prisoners in their cells except for very brief periods.

been found guilty of violating prison rules. Both categories of inmates remained there until April 1982, when the Department separated them by moving the disciplinary segregation inmates to Cellhouse F. In January 1985, the Department moved all protective custody inmates to Cellhouse H, which had previously housed inmates of the general population.

Since May 1979, when the protective custody inmates were moved to be housed with the disciplinary segregation inmates, the programs and living conditions of plaintiffs have been substantially restricted. It is necessary to compare the services available to the general population inmates to understand this disparity of service allocation.

The Department provides Stateville's general population inmates the opportunity for free exercise of religion through communal worship services, classroom religious instructions, and private religious counseling. Chaplains meet regularly with all such inmates who request private meetings. Protective custody inmates, however, have received significantly inferior access to religious services since the move in May 1979. There are neither communal worship services nor classroom religious instructions. The only permitted religious programming was to allow the prison chaplains to counsel inmates through the cell bar doors.

After implementation of the 1981 *Meeks* consent decree, in January 1983 the Department agreed to provide protective custody inmates with one non-denominational communal worship service at the rear of Cellhouse B-West. These services, however, were eliminated in mid-1984 without explanation. After protective custody residents were moved to Cellhouse H in early 1985, this service was reinstated and held in the small area converted from garage use, permitting only 25 inmates to attend. The Department still does not allow these inmates to meet privately with clergy; the clerical staff is forced to counsel through the cell doors' "chuck hole." Visits by these clergymen average once a week.

A second area of programming, library services, is made available to the general population without burdensome

restrictions. This library access includes legal materials, newspapers, magazines, audio-visual materials, legal counseling and assistance, and special programs on mental health, ethnic and cultural awareness, and paralegal training. As was the situation with religious services, after the lockdown protective custody prisoners received markedly inadequate and inferior access to the library. When an inmate of this status wants to go to the library, he must be locked alone in one of seven special security cages, except that cellmates, co-litigants, or co-defendants can share a cage. These inmates may not leave the cages, and they must depend on a library clerk to retrieve materials for them.

Access to the library also differs from that of the general population in the following respects: requests to go to the library are taken on a first-come, first-serve basis; the law clerks may not obtain general library materials for plaintiffs unless specially approved by a general library clerk; plaintiffs are never allowed to attend any special library programs; and to obtain legal counseling, plaintiffs have to discuss their cases with either the Chief Legal Advocate or law clerk, who must stand outside the bars of the library cage. Finally, with the move of protective custody inmates to Cellhouse H in January 1985, library carts were not permitted to come to the protective custody unit to provide any satellite services.

Various vocational and educational programs also are provided to general population inmates aimed at providing rehabilitation. These services are designed to encourage the attainment of higher education and to maintain professional instruction. Between May 1979 and November 1982, however, no vocational jobs were available for protective custody inmates. Only after entry of the *Meeks* decree have a limited number of such jobs been made available. Educational instruction for these inmates has not fared much better. Between May 1979 and January 1983, there were no classroom courses, with only basic education tutoring provided through the doors of the cells. Since implementation of the *Meeks* decree, a single col-

lege-level course and a limited General Education Development program were offered. The college course was discontinued in 1985 with the move to Cellhouse H. Demand for general instruction always exceeds the permitted number of registrants.

Finally, basic living conditions between those inmates of general population and protective custody status are simply not comparable. Protective custody inmates must eat all meals in their rooms, and these unpalatable meals were transported in unheated carts until November 1985. Recreational opportunities are poor for protective custody inmates. They are permitted no indoor recreation in gymnasium or social halls. They have solely 1¼ hours of dayroom or yard access on alternate days.

The Department attempted to explain this disparate treatment as "security-motivated" or "security-oriented," explanations found arbitrary, exaggerated, and pretextual by the district court. It was quick to acknowledge that "[a]s a maximum security prison housing inmates drawn from among the worst offenders in Illinois, Stateville presents understandable security concerns." But in attempting to isolate protective custody inmates from the general population, the Department chose to treat these inmates with the same security procedures afforded those involuntarily assigned to disciplinary segregation.

The Department's articulated security concerns are belied by its inconsistent manner in treating protective custody inmates, its unused viable options to the restricted living conditions and lack of programming, its actions totally unrelated to security, and finally its lack of effort to provide comparable programming. We will highlight some of these matters which were extensively noted by the district court.

The Department's conduct demonstrates how its security reliance rationale is incomplete. This is first revealed in the inconsistent behavior afforded to protective custody inmates. While these inmates were permitted to take daily exercise together, they could not go to the library as a

group. Inmates could exercise in the dayrooms together; yet they had to eat in their cells separately. Finally, the Department allowed groups to walk in the yard communally while prohibiting such recreation as watching movies together.

The district court, after of course realizing that it was not its function to assume responsibility for managing Stateville, named several available alternatives providing comparable conditions and programming to plaintiffs without jeopardizing any properly applied security concerns of the Department: (1) Stateville has many areas of usable space that could be converted to activity space; (2) light vocational training could be offered to inmates to be performed in their own cells; (3) a protective custody dining room could be added in Cellhouse H which would satisfy *Meeks*; (4) revised library scheduling could allow greater access to inmates; and (5) night-shift work details could be implemented to allow protective custody inmates the opportunity to earn money.

These available alternatives were not pursued by the Department for reasons unrelated to security. Satellite law libraries, denominational worship services, vocational training in individual cells, and more Sunday recreation for protective custody inmates were all options found by the court to be without any significantly increased security burdens.

In summarizing, Judge Shadur found that this disparity in programs stemmed from the Department's lack of desire to make improvements, when opportunities to make such changes were long available to the defendants. Evidence adduced at the bench trial tended to show that the Department did have the ability to overcome security and operational concerns when it chose to do so.

After weighing this evidence, the court found for plaintiffs, denied defendants qualified immunity from damages, held that compensatory damages would be proper, and reserved ruling on punitive damages. 646 F. Supp. at 1409-1410. The court did not enter a remedial order with

its opinion. Rather, in deference to the Department, it first directed the defendants to submit their views on the scope of a proper remedial plan. Finding their subsequent submissions inadequate, the court again requested defendants to specify what remedy would be consistent with the security needs of Stateville.

The defendants provided plaintiffs' counsel with their tentative proposals on May 22, 1987, and on July 7, the court ordered defendants to show cause why they should not be held in contempt because their proposal "could not, under any view, have been understood by them in good faith as conforming to what this court had ordered them to do" (Sup. App. 27).

Defendants responded on July 21, 1987, but the district court again found defendants' conduct intransigent and ordered them to provide a schedule of program changes by August 4, 1987 to comply with the earlier opinion. When this submission again stated that compliance was not feasible, the court adopted the suggestion by the plaintiffs to appoint a special master to assist the court in developing timetables to have the Department adhere to the mandate issued in the opinion (Sup. App. 54-56).

The defendants objected to this proposed appointment. On August 31, 1987, the court entered its final injunctive order which permanently enjoined the Department from violating the inmates' constitutional rights, ordered the Department to provide plaintiffs with comparable programs and living conditions as to those afforded the general population, and provided for the appointment of a special master to develop, evaluate, and scrutinize the defendants' implementation of remedial relief to be entered at a later date.[5] On September 23, 1987, this Court granted defendants' motion to stay the final order pending appeal. We extended this stay on December 17, 1987, so that the situation could be properly evaluated here.

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[5] The injunction is not officially reported but is reproduced as the first item in defendants' Appendix.

*Analysis*

On appeal, defendants initially contend that the district court ignored "a fundamental principle of law enunciated by the Supreme Court in prisoner's rights cases; that is, the principle of judicial deference to prison administrators in the operation of their institutions." They also point to the recent decisions in *Turner v. Safley*, 107 S. Ct. 2254, and *O'Lone v. Estate of Shabazz*, 107 S. Ct. 2400, but *Turner* acknowledged that a prison regulation "cannot be sustained when the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary and irrational." 107 S. Ct. at 2261. A prison regulation that infringes on inmates' constitutional rights is valid only "if it is reasonably related to legitimate penological interests." *Id.* at 2261; *O'Lone*, 107 S. Ct. at 2404; see also *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988).[6] This Court, in *Hadi v. Horn*, 830 F.2d 779, 784 (7th Cir. 1987), reviewed both *O'Lone* and *Turner*, and grouped the several factors used in applying the "reasonableness" standard into a four-part test:

1. "whether a valid, rational connection exists between the regulation and a legitimate government interest behind the rule";
2. "whether there are alternative means of exercising the right in question that remain available to prisoners";
3. "the impact accommodation of the asserted constitutional right would have on guards and other inmates and on the allocation of prison resources"; and

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[6] Judge Shadur was without the benefit of *O'Lone* and *Turner*. He relied upon the standard articulated in *Caldwell v. Miller*, 790 F.2d 589, 597-598 (7th Cir. 1986). This Court, however, recognized in *Hadi v. Horn*, 830 F.2d 779, 784 n.6 (7th Cir. 1987), that "*O'Lone* and *Turner* have served to clarify and amplify, rather than depart from, [the *Caldwell*] standard."

4. "although the regulation need not satisfy a least restrictive alternative test, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable."

We again rely on these factors to determine whether Stateville's restriction of plaintiffs' constitutional rights to free exercise of religion, meaningful access to the courts through use of library services, due process, and equal protection were reasonable in light of legitimate security concerns. The district court determined that these restrictions were arbitrary and pretextual, bearing no reasonable relationship to legitimate penological interests. This finding must be accepted unless clearly erroneous. *Hadi*, 830 F.2d at 784. After reviewing the various allegations of deprivations, we then analyze defendants' arguments that the court below improperly (1) relied on violations of Illinois law, (2) failed to accord the defendants qualified immunity for their actions or omissions, (3) did not consider the Eleventh Amendment bar to suits against the state, and (4) exceeded its remedial power by improperly authorizing the appointment of a special master.

*Freedom of Religion*

Inmates have only those First Amendment rights that are consistent with prison discipline and do not conflict with legitimate objectives of institutional administration. See *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-130; *Pell v. Procunier*, 417 U.S. 817, 822; *Ustrak v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986), certiorari denied, 107 S. Ct. 95. But prison officials may not interfere with a prisoner's free exercise of religion unless the asserted regulation is justified by a legitimate penal interest. In *Wells v. Franzen*, 777 F.2d 1258, 1265 (7th Cir. 1985), this Court found such a legitimate interest when it upheld the denial of a prisoner's opportunity to practice his religion when he was physically restrained due to suicidal tendencies. We also found a legitimate interest supported by considerations of safety

and security in the regulation of a Rastafarian's hair length by prison officials in *Reed v. Faulkner*, 842 F.2d 960.

Prison administrators must permit inmates the reasonable opportunity to exercise religious freedom. *Cruz v. Beto*, 405 U.S. 319, 322 n.2; *Caldwell v. Miller*, 790 F.2d at 596, and the state need not demonstrate that there is no reasonable alternative method by which the prisoner's First Amendment rights can be accommodated without creating security problems. *O'Lone*, 107 S. Ct. at 2405. Courts balance these competing interests to determine if the inmate's First Amendment rights should prevail. *Turner*, 107 S. Ct. at 2264.

The district court ruled that defendants violated plaintiffs' right to the free exercise of their religion by not allowing communal religious services, by not permitting prisoners the participation in rituals of their faith, and by depriving the inmates of religious counseling and instruction. Viewing the facts of this case in light of the *Caldwell* standard that prison restrictions on religious activities must be reasonably adopted to achieve an important correctional goal and reasonably necessitated by security considerations, the court found that defendants denied these opportunities without a reasonable relationship to legitimate penological interests. This denial thus failed the first part of our recent *Hadi* test, for no "valid, rational connection exists between the regulation and a legitimate government interest behind the rule[s]." *Hadi*, 830 F.2d at 784.

Defendants oppose a conclusion that Stateville's policies in providing religious services to protective custody inmates were inferior. They assert that "the logical relationship between the single non-denominational service and the protective custody inmate is apparent" (Br. 34). This policy is allegedly implemented because offering different religious services would "increase the risks" to inmates due to "increased numbers of group movements."

Focusing on the *O'Lone* analysis, they further claim that there are other means available for protective custody in-

mates to exercise their religion through daily visits from chaplains and the distribution and receipt of religious materials. According to defendants, any increased number of communal services would have an allegedly burdensome "ripple" effect on both the staffing and programming in protective custody.

These justifications simply do not remedy the inadequate and needlessly inferior alternatives that the inmates have to exercise their religious beliefs. That the district court could offer some easily available and obvious options to provide more sufficiently the right to religion clearly shows that the Department's current policies were unreasonable. Defendants have offered no tenable ground for overruling the conclusion below that the Department's denial of the inmates' opportunities for regular communal worship, religious instruction, and private religious counseling did not bear an adequate relationship to legitimate penological interests.

*Right of Access to Courts*

Under the Fourteenth Amendment prisoners have the due process right to adequate, effective, and meaningful access to courts to challenge violations of their constitutional rights, *Bounds*, 430 U.S. at 824, and this access neither may be denied nor obstructed. *Johnson v. Avery*, 393 U.S. 483, 485. Prison officials correspondingly have an affirmative duty to assist prisoners in preparing and filing legal papers. This may be accomplished either by establishing a law library or by providing consultation from legally trained assistants. *Bounds*, 430 U.S. at 828. These officials cannot hinder prisoners from this access, *Wolff v. McDonnell*, 418 U.S. at 578, or retaliate against prisoners who attempt to exercise their constitutional rights. See *Adams v. James*, 784 F.2d 1077, 1082 (11th Cir. 1986). This Court has articulated the constitutional standard to require "meaningful," not total or unlimited, access to courts. *Martin v. Tyson*, No. 87-2371, slip op. at 6 (7th Cir. May 9, 1988); *Campbell v. Miller*, 787 F.2d

217, 226 (7th Cir. 1986). Restrictions on this access will not be an unconstitutional interference when justified by security concerns, which prison officials bear the burden of proving. *Id.*

Prison officials need not provide both direct legal aid and access to a law library so long as prisoners receive meaningful access. *Bounds*, 430 U.S. at 832. Administrators may devise constitutionally acceptable alternatives if the prison's functioning will become unduly burdened by providing a particular type of access. This Court has recently sustained such restrictions on access to accommodate legitimate administrative concerns. In *Campbell*, restrictions on library access and attorney visitation were justified for security reasons. 787 F.2d at 226-228. The institution's system of requesting case law materials by exact date was upheld when dangerous inmates were denied full access to the prison's main law library. *Id.* at 229. In sustaining the restrictions, we held that "[p]rison administrators may exercise wide discretion within the bounds of the constitutional requirements of meaningful access." *Id.*

In *Caldwell v. Miller*, 790 F.2d 589, 606 (7th Cir. 1986), restrictions on library use as part of the post-riot lockdown at the Marion Penitentiary were deemed permissible. This Court upheld as constitutionally adequate a plan that provided for inmate access to a "satellite" library coupled with a system for requesting materials from the main branch.

Similarly, in *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986), prison authorities were allowed to balance the right of the prisoners to use the mails for court access with considerations of the institution's budget. Prisoners there were permitted to mail at state expense three first-class letters per week plus reasonable additional legal correspondence. *Id.*

Finding that the library services provided to plaintiffs had been inadequate, the district court in this case concluded that plaintiffs had been deprived of meaningful ac-

cess to the courts. The court analogized this situation to the "Catch-22" present in *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983), where inmates at the Marion federal penitentiary were denied access to the courts due to the library's lack of either state law materials or sufficient supplemental legal aid. In this case, "[e]ven if an inmate were sophisticated and attuned to the nuances of legal meaning, the limitations imposed by defendants would convert the possible work of minutes into a need to spend hours—and, moreover, hours to which no plaintiff could gain access" (646 F. Supp. at 1389).

Defendants disagree with this finding and contend that the access to the law library provided to protective custody inmates at Stateville meets the constitutional mandate of "meaningful access" to the courts. Viewing the Stateville plan as a whole, they contend that it meets the requirements of the *Bounds* case because the Department allegedly provides the inmates with trained assistance and regular access to an adequate legal library. Defendants' restriction of the plaintiffs' right to meaningful access, however, again fails to satisfy the *Hadi* standards. The access is severely inadequate in comparison to that afforded the general population. Moreover, the options such as rescheduling of library hours and use of satellite libraries would be viable alternatives to the current quandary faced by protective custody inmates desiring to do legal research. The evidence before the lower court sustains our holding that neither a reasonable relationship to a legitimate penological interest nor any negative impact from accommodating plaintiffs' right to court access was credibly identified. This arbitrary denial of access to published materials certainly violated the protective custody inmates' First Amendment rights. *Martin, supra*, slip op. at 3.

*Due Process Protections*

Plaintiffs here asserted that the defendants' restrictions on their religion and access to court rights and denial of

housing and programmatic conditions comparable to those offered the general population residents violated their rights to due process and equal protection. The district court considered the due process and equal protection claims together, but we review them separately for purposes of this appeal.

Prisoners claiming a due process violation under the Fourteenth Amendment must demonstrate that they have been deprived of a protected liberty or property interest by arbitrary government action. *Meachum v. Fano*, 427 U.S. 215, 223-224. These interests may arise from the Constitution, see *Vitek v. Jones*, 445 U.S. 480, 493-494; cf. *Newbury v. Prisoner Review Board*, 791 F.2d 81, 85 (7th Cir. 1986), statutes, see *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7-11; *Walker v. Prisoner Review Board*, 789 F.2d 396, 400 (7th Cir. 1985), certiorari denied, 106 S. Ct. 817; but see *Harris v. Fleming*, 839 F.2d 1232 (7th Cir. 1988) (prisoners ordinarily have no liberty or property interests in receiving or retaining a job while in prison); *Toney-el v. Franzen*, 777 F.2d 1224, 1226-1227 (7th Cir. 1985) (where state remedies are adequate, inmate has no constitutionally protected liberty interest in early release despite state statute affording good time credits), certiorari denied, 106 S. Ct. 2909, and administrative regulations, see *Hewitt v. Helms*, 459 U.S. 460, 471-472; *Fleury v. Clayton*, No. 87-2545, slip op. at 3, 5 (7th Cir. May 11, 1988); cf. *Mathews v. Fairman*, 771 F.2d 409, 414-415 (7th Cir. 1985) (regulation on administrative transfers did not limit official discretion and did not create protected liberty interest). See generally *Caldwell v. Miller*, 790 F.2d at 602.

Once an alleged liberty interest is considered protected, the court then determines what process is due the prisoner by balancing the private interest affected, the risk of error in the procedures used, and the state interest in institutional security. See *Wolff v. McDonnell*, 418 U.S. at 556. The particular due process protections are limited by the need to pursue legitimate correctional goals. *Id.* Any additional procedural safeguards depend on the bal-

ance between the rights accorded both private and governmental interests. See, *e.g.*, *Mendoza v. Miller*, 779 F.2d 1287, 1294-1296 (7th Cir. 1985) (officials need not reveal factual bases for disciplinary decisions involving informants); *Garza v. Henderson*, 779 F.2d 390, 394-397 (7th Cir. 1985) (prison disciplinary hearing held without inmate present does not violate due process unless prejudice demonstrated); *Merritt v. De Los Santos*, 721 F.2d 598, 600-601 (7th Cir. 1983) (due process violated when member of disciplinary tribunal involved in alleged incident); *Dawson v. Smith*, 719 F.2d 896, 898-899 (7th Cir. 1983) (prison disciplinary committee need not disclose source of confidential report), certiorari denied, 466 U.S. 929.

Defendants here claim that the protective custody inmates' due process rights have not been violated because first, the Fourteenth Amendment creates no liberty interest in remaining in the general inmate population as opposed to protective custody, and second, Illinois law, as embodied in A.R. 808 (now Department Rule 501.310), creates no liberty interest under the facts alleged by plaintiffs. The first claim is irrelevant, for defendants never dispute that the plaintiffs have a constitutional interest in receiving meaningful opportunities for free exercise of religion and access to the courts. As shown, they have been deprived of those rights. Defendants cite *Hewitt v. Helms*, 459 U.S. 460, for the proposition that the transfer of an inmate to less amenable quarters for non-punitive reasons does not violate the Constitution. But in light of the district court's finding that there were no meaningful opportunities to exercise the plaintiffs' religious and court access rights, this argument does not respond to the truism that a liberty interest in those rights is protected.

The same is true of plaintiffs' claim of due process with respect to housing and programs under a state-created liberty interest. A.R. 808 had binding force because it was adopted according to proper administrative procedures and required that "[h]ousing and programmatic accommodations [for protective custody inmates] shall be comparable

to those provided for the general population."[7] See *Miller v. Henman*, 804 F.2d 421, 426 (7th Cir. 1986). Substantive limitations were placed on the Department's discretion, *Olim v. Wakinekona*, 461 U.S. 238, 249, and the mandatory language ("shall") of the 808 regulation created an expectation of and an entitlement to housing and services comparable to the general population's for protective custody inmates. See *Board of Pardons v. Allen*, 107 S. Ct. 2415, 2420-2421. Furthermore, "specific substantive predicates," *Harris v. McDonald*, 737 F.2d 662, 665 (7th Cir. 1984), were contained in A.R. 808 to create such a liberty interest.

Defendants merely assert that *Hewitt* governs, and that only regulations governing involuntary placement of inmates create a liberty interest. 103 S. Ct. at 871; see also *Fleury, supra*, slip op. at 5. Yet as found by the district court, protective custody is "not truly voluntary." The Department's further attempt to show that "comparable" implies only official discretion to choose services rather than not afford protective custody inmates equal treatment does not mesh with the *Meeks* decree, which specifically described the programs and services required for these inmates. It is unquestioned that the revised A.R. 808 was intended to incorporate the *Meeks* requirements.

The record below properly supports the district court's conclusion that the Department's decision to deprive plaintiffs of the foregoing rights was arbitrary. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539-541. "Due process rights are not infringed when the imposition in question is reasonably related to a legitimate governmental purpose." *Martin, supra*, slip op. at 10. But when weighed against the factors in *Hadi, supra*, defendants' deprivations of plaintiffs' right to religion, and access to courts

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[7] In the revised version of A.R. 808 responding to the broad 1981 *Meeks* decree, "essential services" was substituted for "programmatic accommodations" to mesh with that decree (646 F. Supp. at 1385).

and *Meeks* housing programs and services were unreasonable, therefore denying the inmates their liberty interests without due process of law.

*Equal Protection*

Prisoners do not surrender their rights to equal protection at the prison gate. Unequal treatment among inmates, however, is justified if it bears a rational relation to legitimate penal interest. *Hudson v. Palmer*, 468 U.S. 517, 522-523. Compare *Harris v. Greer*, 750 F.2d 617, 618-619 (7th Cir. 1984) (alleged racial segregation by cell and job assignment states claim) and *Madyun v. Thompson*, 657 F.2d 868, 873-874 (7th Cir. 1981) (allegation of racially motivated misuse of authority states claim) with *Kincaid v. Duckworth*, 689 F.2d 702, 704 (7th Cir. 1982) (four-year difference between life termers and inmates under term of years for eligibility for change of security status justified by security risk). Plaintiffs claimed that the defendants' provisions for programming and living conditions were unequal in comparison with general population inmates. This intentional disregard of plaintiffs' rights in adopting certain policies was tantamount to intentional discriminatory behavior. See *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988). The district court agreed with plaintiffs and held that defendants' regulations did "not bear any such rational relationship to any legitimate state purpose—instead, their purported justification in terms of security concerns is an arbitrary and exaggerated response and masks defendants' real delinquencies."

To escape liability for disparately treating plaintiffs, defendants rely on this Circuit's decision in *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), certiorari denied, 107 S. Ct. 77, where the unequal treatment of protective custody inmates had "a substantial rational basis in the legitimate interest of prison security." *Id.* at 1256 (quoting *Allgood v. Morris*, 724 F.2d 1098, 1101 (4th Cir. 1984)). In *French*, four inmates in protective custody at an Indiana state prison claimed that they did not have equal

access to the same vocational, academic, and rehabilitation programs as the general population. We held that security reasons can justify limiting the access of prisoners in protective custody. *Id.* at 1256; see also *Taylor v. Rogers*, 781 F.2d 1047, 1050 (7th Cir. 1986) (same).

These cases, however, are inapposite—distinguishable because here the Department's explanations for security concerns were discredited by the court below. These defendants failed to establish the necessary relationship between prison security and disparate treatment of residents of protective custody, a relationship deemed crucial by this Court in *French*.

To the extent the district court's legal conclusions concerning disparate treatment depend on its evidentiary findings that defendants' policies were illegitimate, deference must be accorded to the district court's ruling. See *David K.*, 839 F.2d at 1265. We therefore approve the district court's decision that the Department's policies violated plaintiffs' equal protection rights.

*Illinois State Law*

Plaintiffs initially asserted before the district court that defendants' denial of housing and programmatic conditions comparable to those provided general population residents and of comparable opportunity for rehabilitation and parole each violates Illinois state law. Based on that claim, defendants now argue that the final injunctive order rested on violations of state law and that the district court ordered their compliance with A.R. 808. A violation of state law would not create liability under Section 1983. See *Fleury*, *supra*, slip op. at 3; *Martin*, *supra*, slip op. at 4; cf. *Jones v. Thieret*, No. 87-2490, slip op. at 5 (7th Cir. May 11, 1988).

While the court did find that the defendants' failure to comply with A.R. 808 and the *Meeks* decree violated state law, the court did not premise its order of injunctive relief on those alleged violations. Rather, the court specifically announced that it had removed "the references to 'under

the laws of the State of Illinois' . . . because I am not ordering compliance with state law as such." (Pl. Br. at 45). The court properly justified its order on the foregoing federal constitutional deprivations.

*Defenses to Liability*

*Qualified Immunity*

The defense of immunity may prevent an inmate from securing relief for deprivations of constitutional rights. Prison officials who act in good faith receive qualified immunity for their actions. *Procunier v. Navarette*, 434 U.S. 555, 561. The objective test established by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, and recently reiterated in *Anderson v. Creighton*, 107 S. Ct. 3034, 3039, shields officials from liability if they did not violate clearly established constitutional or statutory rights of which a reasonable person would have known. See also *Rakovich v. Wade*, No. 85-1529, slip op. at 53-65 (7th Cir. June 8, 1988) (*en banc*); *Kurowski v. Krajewski*, No. 87-2675, slip op. at 11 (7th Cir. June 2, 1988); *Forrester v. White*, No. 84-1823, slip op. at 5 n.1 (7th Cir. May 5, 1988); *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986). In *Davis v. Scherer*, 468 U.S. 183, 194, the Court further held that claimants must show that the rights allegedly violated were clearly established at the time of the conduct at issue. See also *Wade v. Hegner*, 804 F.2d 67, 71 (7th Cir. 1986). Defendants have the burden of proof of satisfying this affirmative defense. See *Klein v. Ryan*, No. 87-2554, slip op. at 2 (7th Cir. May 16, 1988); *Walsh*, 837 F.2d at 789.

Because this Court is reviewing a denial of a claim of qualified immunity, it is necessary to decide "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528. Moreover, "[t]o determine whether such legal norms existed at the pertinent time, we often refer to closely analogous case law, decided before the public official acted or failed to act." *Abel v. Miller*, 824 F.2d 1522, 1533 (7th Cir. 1987).

Defendants, conceding that the district court relied on landmark Supreme Court cases which either established or reaffirmed general constitutional rights, make the shallow argument that the cases relied on did not clearly establish the specific rights to meaningful access to the courts, free exercise of religion, due process, and equal protection. Yet each of the cases used as support by plaintiffs clearly established that prison officials must demonstrate at a minimum a rational basis for abridging the inmates' religious rights, *Cruz*, 405 U.S. at 322 n.2, rights to legal services, *Bounds*, 430 U.S. at 825, due process rights, *Wolff*, 418 U.S. at 555-556, and equal protection rights, *French v. Heyne*, 547 F.2d 994, 997 (7th Cir. 1976). In our view, the parameters of the "rights" that the defendants violated are sufficiently clear in light of prior decisional law. See *Walsh*, 837 F.2d at 789. As the Supreme Court noted in *Mitchell*:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.

472 U.S. at 528; see also *Wrigley v. Greanias*, 842 F.2d 955 (7th Cir. 1988). Defendants basically ask us to assess whether or not the plaintiffs stated a claim for violation of their rights to meaningful access to the courts, full exercise of religion, due process, and equal protection. However, in attempting to distinguish their case from the landmark cases relied on by the district court, the defendants simply fail to demonstrate a legitimate rationale justifying their deprivation of rights of these protective custody inmates. Therefore the district court properly denied defendants qualified immunity.

*Eleventh Amendment*

The Eleventh Amendment to the Constitution bars suit against a state official when the state is the real party in interest. *Pennhurst State School & Hosp. v. Halder-*

*man*, 465 U.S. 89, 101. This is because the relief sought against the official is really against the state in that a court decree would operate against the state and not the official personally. This absolute immunity, however, does not apply if, as here, the suit challenges the constitutionality of the official's actions. *Id.* at 102.

Defendants try to compare their case with *Pennhurst*, where the issue was "whether a federal court may award injunctive relief against state officials on the basis of state law." *Id.* While the district court did find that defendants' failure to comply with A.R. 808 and the *Meeks* decree violated state law, it modified the parties' proposed forms of final order to remove the references to state law as already noted. The court also expressly did not order compliance with state law. See *supra* at pp. 23-24. Finally, the court did appropriately order relief for the federal constitutional violations.

The Supreme Court recently dismissed a petitioner's contention that *Pennhurst* applied in *Deakins v. Monoghan*, 108 S. Ct. 523. There petitioners suggested that state law claims predominated in the complaint and the federal claims were minimal and unsubstantial additions. As in *Deakins*, though, a sizable portion of the relief sought in the plaintiffs' complaint in this case was intended to compensate the class for injuries allegedly sustained in violation of federal constitutional rights. Because the plaintiffs here challenged the federal constitutionality of the Department's policies, the Eleventh Amendment claim of defendants must similarly fail.

*Appointment of Special Master*

The district court's final injunctive order required the appointment of a special master pursuant to Rule 53(b), Fed. R. Civ. P. This rule provides such an appointment "only upon a showing that some exceptional condition requires" this action. Defendants contend that the record in this case does not demonstrate exceptional circumstances warranting this remedy and that such an appoint-

ment is inappropriate when state governments need flexibility to comply with a court order.[8] Cf. *United States v. City of Parma*, 661 F.2d 562, 579 (6th Cir. 1981), certiorari denied, 102 S. Ct. 1972. Plaintiffs respond by pointing to defendants' conduct during this litigation. The district court observed that defendants have demonstrated a "continued and deliberate inattention to plaintiffs' constitutional rights," have "wholly failed to take any steps or initiate any measures necessary to redress the constitutional violations identified in the opinion," and have provided "questionable . . . responses to this Court's requests for a proposed plan to correct their violations of such rights" (Final Order, reproduced in defendants' Appendix, at 2-3).

It is axiomatic that judicial supervision of court orders should ordinarily be exercised directly by a judge rather than by referral to a master. Such referrals "may cause additional costs and delays when reviews by the judge are sought, . . . impair supervisory consistency and cohesiveness, [and] invoke[ ] special costs in the form of compensation and expenses." Manual for Complex Litigation, Second § 20.14, pp. 11-12 (1985). Yet referrals may be appropriate "if, due to the unusual magnitude of the supervision needed in the complex case, failure to make referral would result in inattention or undue delay." *Id.*; see also W. Brazil, G. Hazard, & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters (1983).

The judge's authority to make a referral under Rule 53, if not consented to by the parties, is limited. *La Buy v. Howes Leather*, 352 U.S. 249. But special masters may be appointed to monitor implementation of decrees. See, *e.g.*, *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163 (5th Cir.),

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[8] Because a timely and proper objection to reference to a special master was made and later overruled, appellants can petition this Court for review on appeal. *Jack Walters & Sons Corp. v. Morton Bldg.*, 737 F.2d 698, 712-713 (7th Cir. 1984), certiorari denied, 105 S. Ct. 432.

amended in part and vacated in part on other grounds, 688 F.2d 266 (1982), certiorari denied, 105 S. Ct. 1348.

We fully acknowledge that "[t]he appointment of a special master is the exception and not the rule and [that] there must be a showing that some exceptional condition requires such an appointment." 5A Moore's Federal Practice ¶ 53.05[3] n.42 (1987). But the appointment of a special master was particularly desirable for the final injunctive order of this case, where non-compliance with the previous district court order was emphasized. See *Gary W. v. Louisiana*, 601 F.2d 240 (5th Cir. 1979). The record here is replete with instances of administrative recalcitrance. Therefore appointing a master directed to supervise and coordinate the actions of prison officials to effectuate full compliance is especially appropriate for cases such as this challenging conditions of prison confinement. See *Taylor v. Perini*, 413 F. Supp. 189 (N.D. Ohio 1976). Certainly Judge Shadur cannot be expected to neglect his busy docket to ensure that recalcitrant defendants no longer violate basic rights of this class.

Appellate courts are rightly hesitant to grant writs of mandamus directing a trial court to vacate its reference to a special master unless a clear abuse of judicial power is shown. *Chicago Housing Authority v. Austin*, 511 F.2d 82 (7th Cir. 1975); 5A Moore's Federal Procedure ¶ 53.05[3] n.9 (1987). The defendants' cursory treatment of this issue fails to demonstrate any reversible abuse, and therefore their appeal on this issue cannot be sustained.

The district court judge will be expected to review with care any findings of its special master. *In re Chicago, Milwaukee, St. Paul and Pacific R.R.* Co., 841 F.2d 789 (7th Cir. 1988). The district court's standard of review of the special master's findings and recommendations will be the same as our pertinent standard of review of the district court. Thus the district court will be required to accept the special master's findings of fact unless they are clearly erroneous. *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 689; *Locklin v. Day-Glo Color Corp.*, 429 F.2d

873, 876 (7th Cir. 1970), certiorari denied, 400 U.S. 1020; Fed. R. Civ. P. 53(e)(2) ("In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."); J. Moore & J. Lucas, 5A *Moore's Federal Practice* ¶ 52.03[4], at 52-88 ("a district court's scope of review of the factual findings [sic] made by a master is comparable to that which the appellate court has over the district court's findings of fact"). The special master's legal conclusions, however, will not be entitled to deference by the district court, *Oil, Chem. & Atomic Workers Int'l Union*, 547 F.2d 575, 580 (D.C. Cir. 1976), certiorari denied, 431 U.S. 906; J. Moore & J. Lucas, *supra*, at 52-88 to -89, and will warrant careful scrutiny due to the extensive relief sought by plaintiffs.

*Conclusion*

"Judges are not wardens, but we must act as wardens to the limited extent that unconstitutional prison conditions force us to intervene when those responsible for the conditions have failed to act." *Harris v. Fleming*, 839 F.2d 1232 (7th Cir. 1988). Bad prisons are not inevitable; indeed some are safe, civilized, and provide their inmates with decent work and helpful programs. See generally J. DiJulio, Jr., Governing Prisons: A Comparative Study of Correctional Management (1988). This Court realizes that where state penal institutions are involved, federal courts have reason to defer to appropriate prison authorities. *Procunier v. Martinez*, 416 U.S. 396. The defendants, however, have failed to convince us that the cutback of essential programs and services for protective custody inmates at Stateville has a legitimate rational basis. This cutback and disparate treatment was a flagrant violation of the *Meeks* consent decree, which bound the Department to its provisions. See *Derrickson v. City of Danville*, 845 F.2d 715, 718 (7th Cir. 1988). The increased administrative burden that the defendants assert a decision in plaintiffs' favor would impose upon the prison system is inconsequential when compared with the value of a proper and humane system of protective custody that may protect

human life and curb inmate retaliatory violence. See *Walsh*, 837 F.2d 789, 793. Recently, this Court noted that

> "Confinement in Stateville's segregation unit involves considerable isolation, sometimes for protracted periods; and the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."

*Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988). Plaintiffs in this case, in attempting to secure their physical safety through assignment to protective custody status by the warden, have been punished and treated like those who have violated prison rules and have periodic behavior problems. Depriving plaintiffs of meaningful access to the courts, free exercise of religion, and equal treatment regarding living conditions and programs has not been rationally related to defendants' articulated security concerns. Cf. *Martin*, *supra*, slip op. at 8 (segregation a legitimate response to a security risk).

In Section 1983 cases, prisoners may receive remedies comparable to all civil litigants. District courts may award damages, see *Madison County Jail Inmates v. Thompson*, 773 F.2d 834, 844 (7th Cir. 1985), as well as order appropriate injunctive relief to prevent any continuing deprivation of an inmate's constitutional rights. Cf. *Preiser v. Newkirk*, 422 U.S. 395. The district court has yet to conduct any assessment of compensatory or punitive damages and still has to order a reasonable remedial plan. A knowledgeable and impartial special master to implement a just remedy consistent with the needs of prison security and legitimate penological goals should assure compliance with the court's ultimate decision.

AFFIRMED

FLAUM, *Circuit Judge*, concurring in the result. I must reluctantly concur in the judgment of the court, and therefore write separately. The defendants' litigation strategy in a case of significant public importance has dictated the outcome that we are required to affirm. Their inappropriate form of advocacy and intransigence regarding efforts to effectuate a remedy compel us to uphold an opinion which sweeps very broadly. Indeed, defendants have brought upon themselves the burden of affording to protective custody inmates rights which are not necessarily indicated by recent Supreme Court precedent.

Although the record clearly establishes that the inadequate library privileges allowed to plaintiffs unconstitutionally restrict their right of access to the courts, in my judgment plaintiffs' success on their other claims was far from inevitable. The protective custody inmates' first amendment and due process arguments about the scope of their rights to religious services, vocational and educational programs, jobs, recreation, and living conditions called for a more reasoned rebuttal. But the prison officials were unwilling (or impervious to the need) to articulate credible justifications for their perhaps permissible treatment of these inmates. The defendants apparently failed to advance effectively the lack of reasonable and feasible alternatives. Although we customarily defer to their professional judgment in matters of administration, prison officials whose actions are challenged cannot avoid court scrutiny by reflexive, rote assertions that existing conditions are dictated by security concerns and that the cost of change is prohibitive.

The defendants' and their witnesses' approach caused the district judge to find them utterly lacking in credibility. They appear to have ushered the district court into virtually insulating his findings from review; as the majority points out, we may rarely hold such credibility determinations clearly erroneous. We may never ascertain to what extent these findings were "punitive." The defendants certainly invited them by failing to engage the court in any persuasive discussion of penological objectives and

alternatives. It is discouraging, to say the least, that a most critical state agency has been found so sorely wanting as a litigant by a United States District Court. *See Williams v. Lane*, 646 F. Supp. 1379, 1402-05 (N.D. Ill. 1986).

In particular, the defendants' stance once the court decided their liability made the extreme remedy affirmed today almost inevitable. In the opinion of the district judge, the defendants made no substantial attempt at good faith compliance with the court's directives once liability was established. By refusing to meaningfully comply with the district court's request for aid in fashioning a remedy, defendants ensured a harsher result than would otherwise have been warranted. While the appointment of a special master to implement the court's directives is an extraordinary and disfavored recourse, the defendants and their counsel forced the district judge's hand.

Courts must of course recognize their limited competence in the troubled and complicated area of prison administration. However, prison administrators alleged to have violated inmates' rights must meet such challenges with edifying and illuminating rejoinders drawn from their unique expertise, not with the modest responses advanced in this litigation.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 29, 1988.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

Nos. 86-2922, 87-2436

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

*Plaintiffs-Appellees,*

vs.

MICHAEL P. LANE, Director of the Illinois Department of Corrections, et al.,

*Defendants-Appellants.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 355—Milton I. Shadur, *Judge.*

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

## ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendants-appellants on July 25, 1988, and the response of plaintiffs-appellees to said petition, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

# APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIE WILLIAMS, etc.,

*Plaintiffs,*

No. 81 C 355 vs.

MICHAEL LANE, et al.,

*Defendants.*

## FINAL INJUNCTIVE ORDER

This action came on for a bench trial on January 28 through February 10, 1986. Having heard all the evidence and the arguments of the parties and being fully advised in the premises, this Court found—for the reasons set forth in detail in its Memorandum Opinion and Order of October 21, 1986 (the "Opinion," 646 F. Supp. 1379 (N.D. Ill. 1986))—that defendants have violated and, unless enjoined, will continue to violate the rights of plaintiff Willie Williams and the class (collectively "Plaintiffs") under the First and Fourteenth Amendments to the United States Constitution.

This Court further finds that as responsible public officials, defendants plainly had the duty (irrespective of whether they agreed with the Opinion's Findings of Fact ["Findings"] and Conclusions of Law ["Conclusions"]):

(a) without awaiting entry of a formal court-decreed overall plan, to implement at least those changes in the treatment of protective prisoners that were high-

lighted during the trial, were obvious violations of Plaintiffs' rights to any objective viewer or listener at the trial or to any objective reader of the Opinion, and were readily feasible to be accomplished promptly by the application of constructive effort;[1] and

(b) to apply their experience and knowledge of Stateville to the prompt development of a proposed plan for the implementation of the Findings and Conclusions—a task (1) really impossible for this Court without defendants' informed input and (2) infinitely more difficult for Plaintiffs' counsel, who were forced to attempt to deal with such problems on the basis of limited information, than if defendants were to provide good faith cooperation.

Instead, since the date of the Opinion (a period of fully ten months) defendants have wholly failed to take any steps or initiate any measures necessary to redress the constitutional violations identified in the Opinion. Defendants' continued and deliberate inattention to plaintiffs' constitutional rights, coupled with the questionable nature of defendants' responses to this Court's requests for a proposed plan to correct their violations of such rights, have demonstrated that this case presents an "exceptional condition" requiring the appointment of a knowledgeable and impartial special master under Fed. R. Civ. P. ("Rule") 53 to develop or evaluate (or both) such a plan.[2]

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[1] Two obvious examples from the Opinion are (1) the correction of defendants' needlessly disparate and humiliating treatment of Plaintiffs in the course of affording them unequal and nonmeaningful access to the library (Opinion, 646 F.Supp. at 1387-09, 1400) and (2) defendants' delivery to Plaintiffs of needlessly disparate and inadequate opportunities to engage in the free exercise of religion (Opinion, 646 F.Supp. at 1385-87, 1406-07). This is not intended as an exhaustive catalog, for other examples could but need not be added. It is simply the principle stated in the text that is sought to be illustrated here.

[2] Defendants' most recent (August 28, 1987) submission objects to the appointment of a special master because (1) Rule 53(b) states

(Footnote continued on following page)

IT IS HEREBY ORDERED that:

1. Defendants Michael Lane ("Lane"), as Director of the Illinois Department of Corrections, and Michael O'Leary ("O'Leary"), as Chief Administrative Officer of the Stateville Correctional Center ("Stateville") are hereby permanently enjoined and restrained, pursuant to Rule 65, from any and all conduct that has violated, now violates or will violate the rights of Plaintiffs under the First or Fourteenth Amendments to the United States Constitution in any of the respects identified in the Opinion, a copy of which is attached to and made a part of this Order. For all purposes of this Order Lane and O'Leary will be termed "Defendants."

2. In accordance with Rule 65(d), this Order is binding not only upon Defendants but also upon their agents, servants, employees and attorneys, and also upon all other persons in active concert or participation with any or all

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[2] *continued*

that must be "the exception and not the rule" and (2) defendants should not have to pay the fees and expenses of the special master in light of the possibility that this Order may be reversed on appeal. Both those arguments are unpersuasive:

(a) In all respects the operation of Stateville is in fact being left to defendants without interference by the special master, whose role will not at all be that of running the prison but will rather be that of assisting in the development of a plan.

(b) Here the extended failure of defendants to act in the respects identified in this paragraph of the text is the equivalent of a failure to abide by an injunction order. Defendants' nonperformance since issuance of the Opinion, coupled with the nature of the plan they have finally submitted, demonstrates the need for a special master—indeed makes this case "the exception and not the rule."

(c) Plaintiffs of course cannot pay the special master, and no special master can undertake the work on faith or on credit. Deferral of a special master's appointment until disposition of an appeal would defeat the whole purpose by giving defendants the delay they seek—effectively making defendants the real winners and not the losers of this litigation, no matter who ultimately prevails.

of the foregoing who receive actual notice of this Order by personal service or otherwise. To facilitate the implementation of this Order, Defendants shall promptly notify all other persons upon whom this Order is binding of its issuance in a manner reasonably calculated to give such persons actual notice of this Order. Upon receipt of such notice, such other persons shall also become included in the term "Defendants" for purposes of Paragraphs 3 and 4 of this Order.

3. Defendants shall expeditiously adopt and implement policies and procedures for the operation of protective custody at Stateville that shall at a minimum provide Plaintiffs with programs, housing accommodations and services comparable to those provided to Stateville's general population inmates, consistent with the Opinion's Findings and Conclusions.

4. To the extent possible, Defendants shall comply with Paragraph 3 of this Order without reducing the programs, housing accommodations and services currently provided to Stateville's general population inmates. Any reduction in programs, housing accommodations and services currently provided to the general population inmates that proves necessary to carry out the provisions of Paragraph 3 shall involve the least reduction possible, to the end that this Order shall be implemented so far as possible by raising the level of such programs, housing accommodations and services provided to Plaintiffs rather than lowering the level provided to general population inmates. Further, the requirement to furnish "comparable" provisions to Plaintiffs in all the foregoing respects is intended to have the meaning stated in Opinion's Finding 27 and n.6 (646 F. Supp. at 1385 and n.6). To that end, if Defendants do not furnish fully *equal* provisions to Plaintiffs in any respect in the course of complying with their duty to furnish "comparable" provisions, Defendants shall promptly file reports with this Court identifying (a) such inequality and (b) the bona fide security considerations necessitating such unequal treatment.

5. This Court will promptly appoint a special master pursuant to Rule 53 to monitor compliance with and implementation of the relief ordered in this case in keeping with the Opinion's Findings and Conclusions. Pursuant to Rule 53 and as will be provided in an Order of Reference, all necessary expenses for carrying out the special master's duties shall be charged upon Defendants. To enable this Court to make such appointment, within 14 days of the entry of this Order the parties shall:

(a) investigate and submit written comments on the candidates whose resumes have been submitted to this Court; and

(b) file a proposed Order of Reference.

This Court will thereafter enter the Order of Reference pursuant to Rule 53.

6. This order is intended as a final injunctive order, although there remain for future determination:

(a) the specifics of a plan for implementation of the relief ordered in this action and

(b) the award of compensatory, and perhaps punitive, damages in favor of Plaintiffs and against Defendants.

Accordingly this Court determines that good cause exists for extending indefinitely the time for filing Plaintiffs' petition for costs (including attorney's fees) under 42 U.S.C. §1988 (see this District Court's General Rule 46).

/s/ Milton I. Shadur
United States District Judge

Date: August 31, 1987

# APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIE WILLIAMS, etc.,

*Plaintiffs,*

No. 81 C 355 vs.

MICHAEL LANE, et al.,

*Defendants.*

## MEMORANDUM OPINION AND ORDER

This Court conducted an extended trial in this action January 28 through February 10, 1988 (the "Trial"). Following the Trial (but after a considerable delay occasioned by the need to obtain the final Trial transcript) the parties tendered their respective versions of proposed findings of fact ("Findings") and conclusions of law ("Conclusions"). After full consideration, in accordance with Fed. R. Civ. P. ("Rule") 52(a) this Court sets forth the following Findings and Conclusions,[1] which will constitute the grounds for the contemplated Order referred to at the conclusion of this memorandum opinion.[2]

[1] To the extent if any the Findings as stated reflect legal conclusions, they shall be deemed Conclusions; to the extent if any the Conclusions as stated reflect factual findings, they shall be deemed Findings.

[2] This memorandum opinion and order employs abbreviations for a number of terms: the Stipulation of Uncontested Facts

(Footnote continued on following page)

## *Findings of Fact*

### *I. Background*

#### A. *Claims*

1. This action has been brought under 42 U.S.C. §1983 ("Section 1983") and state law. Plaintiffs allege defendants, as past and present administrators of the Illinois Department of Corrections ("Department") or Stateville Correctional Center ("Stateville"), have violated plaintiffs' rights under the First, Eighth and Fourteenth Amendments to the United States Constitution[3] and under state law. Those alleged violations arise from the living conditions and institutional programs provided to inmates assigned to protective custody at Stateville (Stip. ¶1; Cplt.).

2. Department is an Illinois state agency created pursuant to the Unified Code of Corrections ("Code"[4]). Under the terms of and pursuant to the Code, Department is responsible for maintaining and administering all state correctional facilities and institutions, for accepting persons committed to it for care, custody, treatment and rehabilitation, and for developing and maintaining programs of control, rehabilitation and employment for such committed persons (Stip. ¶2; Code §§1001-1-1, 1003-2-2(a) and (d); PXs 1, 2).

3. Stateville is a maximum security prison located near Joliet, Illinois and administered by Department. It covers

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[2] *continued*
("Stip.____"), Trial transcript ("Tr.____"), deposition designations of record ("Dep.____"), exhibits admitted into evidence ("PX____" and "DX____") and pleadings ("Cplt." for the Amended Complaint, and "FPTO" for the Final Pretrial Order).

[3] Both to conform to customary (though imprecise) usage and to make clear which Fourteenth Amendment guaranty is under discussion from time to time, this opinion will consistently refer to the relevant underlying Bill of Rights provisions rather than to the Fourteenth Amendment, which incorporates those provisions for application to state actors such as defendants.

[4] All citations to provisions of the Code (found in Ill. Rev. Stat. ch. 38) will simply take the form "Code §____."

an area of 2,200 acres, of which approximately 64 are within its walls. Stateville houses approximately 2,000 inmates within five cellhouses: Cellhouse B, said to be the largest cellblock in the world; Cellhouses E and F, which are panopticons or round cellhouses; and Cellhouses H and I, two new "supermax" cellhouses. Stateville inmates are incarcerated primarily for violent crimes, such as murder and Class X felonies, and are serving sentences up to and including life imprisonment. Stateville has approximately 1,000 staff members, of whom 850 work full time (Stip. ¶3; PXs 4-A, 4-B; DeRobertis Tr. 109; O'Leary Tr. 6-7).

4. Protective custody is a status available to a Stateville inmate when he fears for his safety or when the Warden or the Warden's designee believes the inmate's safety may be in jeopardy. Since protective custody at Stateville was created in 1976, the number of inmates with that status has averaged about 200 or 10% of the inmate population, though the precise number varies. At the time of the Trial there were between 260 and 300 inmates in protective custody at Stateville (Stip. ¶¶12, 14; Pedersen Dep. 68).

B-1. *Parties Plaintiff*

5. Willie Williams ("Williams") is an inmate who was assigned to protective custody at Stateville from approximately November 1977 until October 13, 1983, when he was transferred to the protective custody unit at Department's Menard Correctional Center in Menard, Illinois. Williams is the representative of the plaintiff class (Williams Tr. 175-78; 96 F.R.D. 383 (N.D. Ill. 1982)).

6. Plaintiff class consists of all inmates who have been assigned to protective custody at Stateville at any time since April 30, 1982 or who will be assigned there in the future. It is estimated that the total number of class members exceeds 500 (Stip. ¶4).[5]

[5] Plaintiffs' counsel advise defendants have failed to respond to repeated requests under the discovery Rules to produce an ac-

(Footnote continued on following page)

B-2. *Parties Defendant*

7. Michael Lane ("Lane") is Department's Director, a position he has held since 1981. As Director, Lane presides over and supervises Department's total operations. He is responsible for developing, approving and reviewing Department policy and is charged with implementing the statutes and regulations applicable to Department. He regularly performs inspections of the various institutions, has visited Stateville often and is aware of the types of programming available to inmates at the facility (Stip. ¶5; Lane Tr. 26-30).

8. Since November 18, 1983 Richard W. DeRobertis ("DeRobertis") has been Department's Assistant Deputy Director for Adult Institutions. As Assistant Deputy Director, DeRobertis is aware of the types of security and custodial measures used and the types of programming available to inmates at Stateville. Before he became Assistant Deputy Director, DeRobertis served at Stateville as Assistant Warden for Programs from June 1979 to February 1980, as Assistant Warden for Operations from February 1980 to March 1981, as Acting Warden from July 1980 to March 1981 and as Warden (also known as Chief Administrative Officer) from March 1, 1981 to November 18, 1983 (Stip. ¶6; DeRobertis Tr. 96-98, 103). While DeRobertis was Stateville Warden he directed the overall operations of the institution. DeRobertis' job responsibilities as Warden were controlled by statute and Department regulations and directives. He was responsible for implementing the regulations governing Department and for ensuring that his subordinates did so. He also directed all security and custodial measures and all programming for inmates. DeRobertis' staff reported to him through a regular chain of command, was subject to discipline by

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[3] *continued*
curate and complete list of class members, with the length of time each has resided in protective custody. In any event, the exact size and identity of the class has not yet been determined.

him, was subject to his rules and orders and performed all official duties under his authority. Through his frequent visits to the units that housed protective custody inmates and his discussions with those inmates, DeRobertis had knowledge of the conditions in the protective custody units and the programming available to protective custody inmates within those units and the institution generally (Stip. ¶6; Code §1003-1-2; PX 6; DeRobertis Tr. 97-98, 150-52; O'Leary Tr. 6, 88).

9. Michael O'Leary ("O'Leary") has been Stateville Warden since November 19, 1983. O'Leary's responsibilities as Warden have been identical to those formerly held by DeRobertis in that capacity. Between February 1980 and March 1981 O'Leary served at Stateville as Assistant Warden for Programs, and between March 26, 1981 and November 19, 1983 he was Assistant Warden for Operations. In both Assistant Warden positions he was responsible for formulating operating procedures, coordinating resident programs and carrying out the policies, rules and regulations of the institution to ensure the orderly operation of the daily functions of the institution. As Assistant Warden for Operations and as Warden, O'Leary has been principally responsible for security measures within the institution. In all of his Stateville positions O'Leary has made frequent visits to the units that house protective custody inmates, has remained aware of the conditions there and has had knowledge of the programming available to protective custody inmates within those units and the institution generally (Stip. ¶7; O'Leary Tr. 6).

10. Salvadore Godinez ("Godinez") has been Stateville Assistant Warden for Operations since November 19, 1983, with responsibilities identical to those formerly held by O'Leary in that capacity. Between April 1981 and November 19, 1983 Godinez was Stateville Assistant Warden for Programs with responsibility for formulating operating procedures, coordinating resident programs and carrying out the policies, rules and regulations of the institution to ensure the orderly operation of the daily functions

of the institution. As Assistant Warden for Programs and as Assistant Warden for Operations, Godinez has made frequent visits to the units that house protective custody inmates, has been aware of the conditions there and had knowledge of the programming available to protective custody inmates within those units and the institution generally (Stip. ¶8).

11. Gayle Franzen ("Franzen") was Department's Director from January 1979 to February 1981. As Director, his duties and responsibilities were identical to those described in Finding 7 for Lane (Stip. ¶9).

12. Marvin Reed ("Reed") was Stateville Warden from June 1979 to June 1980. As Warden his duties and responsibilities were identical to those described in Finding 8 for DeRobertis when he was Warden (Stip. ¶10).

13. Lou Brewer ("Brewer") was Stateville Warden from September 1978 through June 1979. As Warden his duties and responsibilities were identical to those described in Finding 8 for DeRobertis when he was Warden (Stip. ¶11).

C. *Protective Custody*

14. In 1976 Department adopted Administrative Regulation ("A.R.") 808. A.R. 808 provided for the creation of a protective custody unit in each maximum security facility operated by Department. As established by A.R. 808, protective custody is not an assignment made for disciplinary reasons or because an inmate is regarded as a threat to institutional security. Instead, an inmate is assigned to protective custody either because he believes and the Warden or the Warden's designee confirms, or because the Warden or the Warden's designee believes, protective custody is necessary for the inmate's safety (PX 1-808).

15. Under either method for protective custody placement, defendants are obligated to determine within 10 days of protective custody assignment whether an inmate's protective custody needs are substantiated. If de-

fendants determine the inmate needs protective custody, the inmate is permitted to remain in protective custody as long as the need exists. Between 1979 and 1984 defendants were required to conduct semi-annual reviews of an inmate's need for continued protective custody status. More recently those reviews have been scheduled every 30 days (Stip. ¶12; PXs 1-808, 2-501D; O'Leary Tr. 34; Pedersen Tr. 233-34; Wheaton 1/29/86 Tr. 154-58).

16. If an inmate's protective custody needs are not substantiated, defendants are supposed to have the inmate removed from protective custody. Inmates are permitted to grieve such orders and to remain in protective custody during the pendency of such grievances. Any inmate assigned to protective custody at his own request is allowed to sign out at any time (Stip. ¶12; O'Leary Tr. 24).

17. It is true most protective-custody placements initially result from an inmate's self-designation. But because no inmate is authorized to remain in protective custody unless defendants have substantiated the existence of an identifiable threat to the inmate's safety in the general population, and because on the other hand an inmate's signout subjects him to the risk of such threats if they exist, protective custody status is not truly "voluntary." And although most stays in protective custody are short-term, the length of time that an inmate spends in protective custody is often long-term (and on occasion can last the entire term of the inmate's sentence). Defendants' approach to the handling of protective custody inmates cannot be rationalized on the basis that protective custody status is "temporary" (Flowers Tr. 4-5; Huff Tr. 209-10; Pedersen Tr. 240, 251-52; Williams Tr. 177-78).

18. Since the creation of protective custody status as Stateville, the unit has been located in three different cellhouses. Until January 1, 1979, all protective custody residents at Stateville were assigned to Cellhouse E. No inmates of any other classification were assigned to Cellhouse E at that time (DeRobertis Tr. 100-01; Williams Tr. 179).

19. In early 1979 defendants locked down Stateville and completely reorganized the inmate population. As part of that reorganization, all protective custody inmates were moved to Cellhouse B-West, then known as "Death Valley" because the disciplinary segregation inmates were housed there. Disciplinary-segregation inmates are those who have been found guilty of serious and often repeated violations of prison rules and are generally considered behavioral problems posing security concerns to the institution and other inmates (Stip. ¶¶14, 15; Lane Tr. 18-19; DeRobertis Tr. 104; Williams Tr. 189).

20. Some few protective custody inmates were later assigned to a gallery in Cellhouse B-East. Otherwise, both protective custody and disciplinary segregation inmates remained housed in Cellhouse B-West (though separated from each other there) until April 1982. At that time defendants moved the disciplinary segregation inmates to Cellhouse F and replaced them in Cellhouse B-West with general population inmates (Wheaton 1/30/86 Tr. 53-55; Stip. ¶¶14, 15).

21. In January 1985 defendants moved all protective custody inmates to Cellhouse H, which had previously housed general population and orientation inmates. Defendants first permitted some general population inmates to remain in Cellhouse H to serve as cellhouse help, but later they limited Cellhouse H solely to protective custody inmates (O'Leary Tr. 73; Thomas Tr. 104; Wheaton 10/30/85 Dep. 49-50; Wheaton 1/30/86 Tr. 59-60).

22. Between 1979 and 1982 defendants made no special housing arrangements within Cellhouse B-West for either (a) inmates who had requested protective custody, but for whom defendants had yet to substantiate the need for protective custody status, or (b) for inmates who had been determined by defendants not to need protective custody, but who remained in the protective custody unit pending resolution of their grievances challenging that determination. In 1982 defendants created an investigative section in protective custody for inmates in those two classes.

Currently those two classes of inmates are also placed in specially designated areas within Cellhouse H (Flowers Tr. 7-8; O'Leary Tr. 23-25; Pedersen Tr. 239; Wheaton 1/29/86 Tr. 170-73).

D. *Defendants' Job Responsibilities*

23. Defendants administer Stateville pursuant to the United States Constitution, governing state statutes, applicable court decrees and Department regulations, rules and directives. At a minimum, defendants perform their jobs within the guidelines set by the First, Eighth and Fourteenth Amendments. Under the Code, defendants are responsible for implementing Department's goals, in part through the adoption of appropriate regulations (Code ¶¶1003-1-1 et seq.).

24. Department regulations provide specific directives as to the conditions and programs to be provided to all inmates. As adopted in 1976, A.R. 808 provided "[h]ousing and programmatic accommodations [for protective custody inmates] shall be comparable to those provided to the general population." Programmatic accommodations comprise the full spectrum of programs and services provided to general population inmates, thus covering far more than essential services (PX 1-808; O'Leary Tr. 90-94).

25. In July 1981 defendants entered into a consent decree in *Meeks v. Lane*, 75 C 96 (N.D. Ill.) (the "*Meeks* Decree"), containing numerous provisions relating to the living conditions and programs to be made available to protective custody inmates. Implementation of those provisions was required to be completed no later than July 1984 (DX 3). Among the provisions of the *Meeks* Decree:

> (a) Several provisions relate to inmates who "are not likely to behave in a manner so as to threaten or intimidate other residents" and who require special protection because of "their age, size, nature of crime, prior testimony [or] gang involvement." Stateville's protective custody unit includes such inmates, and they are class members here. Under the *Meeks*

Decree, such inmates "shall have the same opportunities as other inmates in other housing areas of the general population for . . . job assignments, vocational and educational assignments, recreation, access to prison libraries, access to religious services and to all other institutional programs" (DX 3; O'Leary Tr. 104-05).

(b) Various provisions concern programs and conditions for all protective custody inmates generally, compelling: "educational opportunities commensurate with those available to inmates in the general population"; the availability of living conditions, including showers and laundry, "on an equal basis" with the general population; a "plan" to be implemented by June 1984 to provide jobs for protective custody inmates; and a good faith attempt to locate an area suitable for communal dining for protective custody inmates (in the latter respect the *Meeks* Decree specifies "[i]f any new facilities are constructed at Stateville, the Department will consider using them for protective custody dining") (DX 3).

26. To allow for implementation of the *Meeks* Decree, Department promulgated a revised A.R. 808 on an emergency basis. Revised A.R. 808 (now Rule 501.310) altered the regulation to state "[h]ousing accommodations and essential services shall be comparable to those provided for the general population." Although the altered language embraced less than the language of original A.R. 808, revised A.R. 808 is meant to be read together with the requirements of the *Meeks* Decree (PXs 1-808A, 2-501.310, 89, 90, 91; O'Leary Tr 96-103).

II. *Comparison of General Population Programs and Conditions with Those for Protective Custody Inmates*

27. "Comparable," as used in A.R. 808, means "equivalent" or "equal in value or extent."[6] In fact, however, neither the housing or programmatic accommodations nor the essential services provided the protective custody inmates were truly comparable to those offered the general population despite the mandate of A.R. 808. Protective custody programs also were not the "same" as general population programs, though in some instances that is a requirement of the *Meeks* Decree. Nor were they "equivalent" or "equal" in other cases where the *Meeks* Decree specifies they must be (*Webster's Third International Dictionary*; DX 3; Huff Tr. 215-16; O'Leary Tr. 107-09).

A. *Religion*

28. Under the First Amendment all persons, including prison inmates, are guaranteed the right to the free exercise of religion (though inmates' rights may be restricted

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[6] Of course the *circumstances* under which "comparable" provisions may be made for protective custody inmates may well differ from those in which corresponding provisions are made for the general population, because of special demands for security inherent in the very nature of protective custody. In that respect, to draw a contrast to another area of the law of equal protection, it may be wholly appropriate to afford protective custody inmates "separate but equal" conditions. Indeed "comparable" provisions may be something less than "equal" in absolute terms where bona fide security considerations so require. But that does not give defendants the license to substitute shibboleth for reasoned policy—to label every difference in treatment of protective custody inmates as justified by "security" considerations, when in fact major portions of those differences have no demonstrated justification in such considerations at all. As later Findings and Conclusions reflect, defendants' testimony sought impermissibly to attach the magic label of "security" to every instance of their conduct, thereby papering over their own administrative inertia, and simultaneously serving their own desire to avoid administrative inconvenience.

to the extent prison rules are "reasonably adapted" to the legitimate goals of institutional security). Illinois' Code requires defendants to permit "religious ministrations and sacraments" to be available to every inmate at Stateville. Since October 1976 A.R. 839 (now Rule 425) has expressed Department's policy "to provide resources with which residents may expand their knowledge, understanding and commitment to the religious faith of their choice" and 'to provide religious activities for all residents" (Code §1003-7-2(q); PXs 1-829, 2-425; Ledford 1/28/86 Tr. 19-20).

29. Communal religious worship, religious instruction and religious counseling are essential aspects of many individuals' exercise of religion. Those aspects are critical elements of all major religious traditions, particularly the "ministrations and sacraments" that Illinois law requires defendants to make available to every inmate. For many inmates, such religious programs and services provide (or have a substantial potential for providing) vital contributions to health, safety and welfare, a help to moral and ethical conduct and assistance toward rehabilitation. Another important part of the free exercise of religion is an adequate setting for religious programming, offering symbols and a sense of sanctuary (Ledford 1/28/86 Tr. 25-26, 29-31, 49; Ledford 2/6/86 Tr. 50; Yerkes Tr. I 129, 131-39; Yerkes Tr. II 5, 9-13).

30. Defendants have provided Stateville's general population inmates the opportunity for free exercise of religion through numerous programs, including communal worship services, classroom religious instruction and private religious counseling. Some 13 different denominational communal worship services are made available every week, held in one of the three rooms in the chaplaincy building, which are supplied with religious symbols and in at least one case an organ. Through visiting clergy and staff chaplains, the Chaplaincy Department has stood ready to meet any inmate's bona fide request (including such requests by protective custody inmates) for denominational services (PXs 14, 17A, 23, 83G; Ledford 1/29/86 Tr. 23-24, 34-35, 100-01, 105). Defendants similarly offer the general popula-

tion a wide variety of different courses in religious instruction, taught either with staff or visiting clergy. Defendants have also brought in a large number of special religious programs for the benefit of the general population (PXs 14, 16, 17B; Thomas Tr. 96).

31. Before May 1979, while protective custody inmates were in Cellhouse E, they were afforded opportunities for the free exercise of religion essentially equivalent to those afforded the general population. Protective custody inmates were able to participate in weekly denominational communal worship services, and Bible classes were offered in the cellhouse "dayroom" (Williams Tr. 185). Since May 1979 the access to, and the settings for, all aspects of religious programming for protective custody inmates have been significantly and needlessly inferior to those offered the general population. Those deficiencies, summarized in the following Findings, have denied plaintiffs the opportunity for their meaningful free exercise of religion (PX 11; Yerkes Tr. I 120-23, 127-29; Yerkes Tr. II 10-11; Ledford 1/28/86 Tr. 31, 50-53; O'Leary Tr. 108; Huff Tr. 215-16; Wells Tr. 36-37).

32. When they moved the protective custody unit to Cellhouse B-West in May 1979, Defendants stopped all communal worship services and religious instruction for protective custody inmates. Defendants' only "religious programming" (if it may be called that) was to allow the staff clergy to walk the galleries of the protective custody unit. On DeRobertis' orders, visiting clergy were not allowed access to the protective custody unit, thus depriving plaintiffs of access to clergy from several faiths. Because the guards often denied even staff clergy access to the cellhouse, plaintiffs could go several weeks without seeing any clergyman (PX 16; Flowers Tr. 20-26, 41-42; Godinez Dep. 97; Ledford 1/28/86 Tr. 42-43, 94; Ledford 2/6/86 Tr. 50-52; Thomas Tr. 98-99; Williams Tr. 195-96).

33. That absence of religious programs for protective custody inmates was a continuing concern to the Chaplaincy Department, which considered existing conditions de-

plorable. Yet defendants did not even consider reinstituting communal worship services for protective custody inmates until after April 1982, under the compulsion of the *Meeks* Decree and the pressure of this lawsuit (PX 15; Ledford 1/28/86 Tr. 55-56, 63-65, 90; DeRobertis Tr. 187-90).

34. In November 1982 a multipurpose room was constructed at the back of Cellhouse B-West. When that room was opened for use in January 1983, defendants allowed a single weekly nondenominational communal worship service for protective custody inmates. Because services were limited to nondenominational worship, defendants did not permit religious symbols to be present. Even so, services were often crowded, and not all protective custody inmates wanting to attend were able to do so because the room was often full. Those services were discontinued sometime in mid-1984 without explanation (Flowers Tr. 22-23; Thomas Tr. 99-100; Yerkes Tr. 129-31).

35. When defendants moved the protective custody unit to Cellhouse H in January 1985, a single weekly nondenomiational service was reinstituted. Such services are held in an area of the cellhouse converted from garage use. Because the area has a capacity of 20 to 25 inmates, not all inmates desiring to attend are able to do so (Flowers Tr. 26; Ledford 1/28/86 Tr. 96-99; O'Leary Tr. 85).

36. Defendants have never taken a survey of the denominational preferences of protective custody inmates for religious services, nor have they heeded the professed willingness of the Chaplaincy Department to provide services for even the smallest groups of separate denominations. Instead DeRobertis decided a single denomination service was sufficient for the religious needs of protective custody inmates. Then just before the trial of this case, defendants allowed the Chaplaincy Department to offer protective custody inmates a single different denomi-

national service each week.[7] Even now the chaplains have been instructed to deemphasize the denominational aspects of such services, however, and religious symbols are consequently still not present at services (Ledford 1/28/86 Tr. 80-81, 102-04, 129-31; Ledford 1/28/86 Tr. 54-55, 57).

37. Defendants have not allowed protective custody inmates the opportunity to counsel with clergy in private. Even during such sacraments as communion or confession, clergymen have been forced to stand outside the cells while the inmates remained in their cells. Other inmates could usually overhear what was said, which generally proved embarrassing or humiliating to inmates (Flowers Tr. 22-26; Thomas Tr. 99).

38. Finding 37's conditions did not change after construction of the room at the back of Cellhouse B-West (see Finding 34) or after the move to Cellhouse H. Although Cellhouse H contains interview rooms, defendants have not permitted them to be used for private religious counseling. Instead, clergymen must administer sacraments through the "chuck hole" in the solid steel cell doors used in Cellhouse H. Visits by clergymen average once a week, with defendants now making available fewer denominations of clergy than in the past (PX 83C; Flowers Tr. 20-26; Thomas Tr. 101-02; Wheaton 1/30/86 Tr. 162-65).

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[7] Because only a single service is allowed each week, this revised arrangement (under which the particular services are rotated through a cycle) means a Catholic inmate (say) will be provided a somewhat-Catholic-oriented service only once in (say) eight weeks. If we assume (as we must for First Amendment purposes) the sincerity of religious faith, there is not much to choose between (1) a once-a-week fully homogenized service and (2) a once-in-eight-weeks opportunity to practice pretty much the religion of one's faith, with the other seven weeks devoted to services tailored to other people's faiths. Neither way meets a meaningful-free-exercise test. It is particularly offensive, absent any legitimate need (see Finding 39), for defendants to determine the validity or importance of others' religious beliefs and needs and the way they should be implemented. Yet that is just what defendants have done.

39. Neither the restrictions imposed by defendants on communal worship services and religious instruction (see Findings 32-36) nor the restrictions they have imposed on religious counseling (see Findings 37-38) are either necessary or reasonably adapted to achieve Stateville's institutional security goals or any other legitimate correctional goals.

B. *Library*

40. Under the Constitution all prison inmates are guaranteed meaningful access to the courts. Illinois' Code requires every inmate to be given access to a library of legal materials, as well as published materials, including newspapers and magazines. To meet those requirements, defendants have established in a secure, separate building at Stateville a general and law library with a capacity of approximately 75 to 100 inmates (Code §§1003-7-2(a); Johnson Tr. 35, 62-63).

41. Stateville's library has been available to general population inmates Monday through Friday for morning, afternoon and evening sessions. Each cellhouse of general population inmates is scheduled to have access to the library one day per week. That arrangement calls for only weekday use, so the library is closed most weekends (Stip. ¶23; PX 8A; Johnson Tr. 60-61, 63; Morris Dep. 42).

42. All Stateville's library services and programs have been made fully available to general population inmates. That includes full access to the general and law library collections. General population inmates may browse, do their own research and work together on legal projects. Browsing is the way most inmates select books. Tables and chairs are provided, allowing general population inmates to read and study either separately or together. Stateville's library has an audiovisual room, which contains films, videotapes, records, video equipment and record players for both entertainment and education (Stip. ¶23; PX 73; Johnson Tr. 42, 44-46, 49-60).

43. Stateville's law library also has a legal clinic, in which inmate clerks provide legal counseling and such materials as envelopes, paper and typewriters. General population inmates are permitted to have confidential interviews with the Chief Legal Advocate in a converted study cell in the library (Stip. ¶23; PX 73; Johnson Tr. 47, 49-54).

44. Stateville's library also offers special programs to the general population approximately once a week. Such programs include legal seminars and paralegal training, awareness workshops, mental health programs and ethnic and cultural programs. Many programs bring in outside speakers and allow participation, such as question and answer sessions (PXs 8, 73; Johnson Tr. 70-74).

45. While protective custody inmates were housed in Cellhouse E before May 1979, their opportunities for meaningful access to the courts were essentially equivalent to those offered to the general population. Inmates went to the library on a day set aside exclusively for protective custody use, enabling them to browse and otherwise take full advantage of all of the resources of both the law and general library (Williams Tr. 186). Since May 1979 the access given protective custody inmates to library services (as described in Findings 46-54) has been significantly inferior to that afforded the general population and has been insufficient to permit meaningful access to the courts (Huff Tr. 215-16; Wells Tr. 37).

46. When any protective custody inmate is now permitted in the library, he must be locked in one of the seven operative security cages. Only one protective custody inmate is permitted in a cage at a time, except where two can demonstrate that they are cellmates, colitigants or codefendants. Protective custody inmates are never permitted out of the cages to browse, study at tables or use the audio-visual equipment. Instead they must rely on inmates assigned as library clerks to get books and materials for them (Stip. ¶24; Johnson Tr. 46-47, 53, 55-56, 63, 84).

47. Until January 1985 defendants limited the library access of protective custody inmates to Monday morning from 8 to 11 a.m. and Monday through Friday afternoons from 12 noon to 4 p.m. Because only seven cages have been available, the number of protective custody inmates afforded any library access is severely restricted. Plaintiffs' requests to go to the library were taken on a first-come, first-serve basis (unless an inmate had a verifiable court deadline) and were granted only if space in the cages was available (Stip. ¶24; PXs 8A, 75, 76; Johnson Tr. 61, 63; Morris Dep. 44-45). Since January 1985 all Monday morning library access has been eliminated, so protective custody inmates have been scheduled for library use only Monday through Friday afternoons from 12 to 4 p.m. One floor of Cellhouse H (each consists of about 100 inmates) is separately designated for the library each day, and inmates are chosen by the gallery officer on a first-come, first-serve basis. If there is not enough room to permit a particular inmate to go on one day, he does not get priority on later days (Pedersen Tr. 243-44; Wheaton 1/30/86 Tr. 80-81).

48. Defendants have never made any lists of legal materials, general library materials or periodicals available to plaintiffs. Because of the locked-cage arrangement, protective custody inmates are entirely dependent on the library's law clerk coming to them, and the clerk designated to assist them with legal matters is the same clerk assigned to help the general population. Plaintiffs have had difficulty obtaining library materials because that law clerk is often busy in helping general population inmates or in performing his other responsibilities. Under established procedures, the law clerk may not get general library materials for plaintiffs, but must forward any request to a general library clerk (Flowers Tr. 27-28; Johnson Tr. 56, 59; Thomas Tr. 112-13).

49. Defendants have never permitted plaintiffs to have confidential interviews with the Chief Legal Advocate in the privacy of the converted study cell. If a protective custody inmate wants legal counseling, he must discuss

his case while the Chief Legal Advocate or law clerk stands outside the bars of the study cage. Defendants have never permitted plaintiffs to attend any special library programs, including legal programs (Flowers Tr. 28; Huff Dep. 52; Johnson Tr. 54-55, 74; Morris Dep. 55-57, 67).

50. Because they are put on display in full view of persons in the library while in the cages, plaintiffs often would not go to the library "to keep from being harassed." Plaintiffs understandably found the experience of being locked in the library cages "dehumanizing" and "humiliating"—they were like animals on display. For those reasons, the cages often remained empty when the more aggressive general population houses were scheduled for the library (Flowers Tr. 28; Johnson Tr. 85, 91; Thomas Tr. 112).

51. Even apart from its humiliating aspects, plaintiffs' access to library and legal materials is inadequate, and they are often unable to make any effective use of legal resources. For example, plaintiff Williams, when attempting to respond in 1981 to a motion to dismiss his complaint in this lawsuit, could not obtain the legal research or materials he requested or get his pleadings typed (Johnson Tr. 59, 88; Williams Tr. 199-202). More generally, as anyone who has done legal research knows, it is essential to have free access to the books to know just which ones you really need. No one—even the most skilled legal scholar—can work effectively by having to designate *in advance* precisely which books (or which pages) are needed, then having those books (or pages) brought to the individual, then designating other books (or pages) as a result of reviewing the first designation, and so on. Even if an inmate were sophisticated and attuned to the nuances of legal meaning, the limitations imposed by defendants would convert the possible work of minutes into a need to spend hours—and, moreover, hours to which no plaintiff could gain access.

52. When plaintiffs were housed in Cellhouse B-West, inmate law clerks were supposed to visit the protective

custody galleries periodically to take requests for and deliver certain legal and general materials from the library. Often correctional officers denied the clerks access to the cellhouse. Even when they were admitted, they were not permitted to deliver law books from the library to any inmate cell. Although inmates may receive photostatic copies of law materials, they must pay for the copying if it exceeds 300 pages in a year. All the problems described in Finding 51 applied with equal or greater force to such arrangements (Stip. ¶25; Johnson Tr. 68-69, 88, 93).

53. With the move of plaintiffs to Cellhouse H in January 1985, library carts stopped coming to the unit to provide services. Inmate library clerks may come to the unit, but they do not bring large numbers of books into the unit. That aggravated even further the problems described in Finding 51 (Pedersen Tr. 251; Wheaton 10/30/85 Dep. 87-88).

54. Since May 1979 defendants have never set aside the library for the exclusive use of protective custody inmates. In 1982 the Stateville librarian proposed that the library be opened on weekends for "low profile" inmates, such as those in protective custody. However, the correctional staff library liaison told the librarian to drop the matter, because such weekend library services would require a change in the defendants' "mindset." No weekend library services have been instituted for protective custody inmates (Johnson Tr. 63-66).

*C. Vocational and Educational Programs*

55. Illinois' Code specifies that a goal of Department is to "restore offenders to useful citizenship." To meet that objective, defendants are required to provide vocational and educational programs designed to give all inmates the opportunity to attain the achievement level equivalent to the completion of the twelfth grade, to encourage the attainment of higher levels of education and to maintain professional instruction wherever possible (Code §§1001-1-2(d) and 1003-6-2(d)).

56. Under A.R. 500 (effective June 1, 1977) and its subsequent revisions, Department's policy is to "provide residents with academic and vocational opportunities . . . so that their return to the free society will be enhanced and their prospects for employment increased." Administrative Directive 04.10.101 (effective January 15, 1985) further provides defendants must "ensure that academic and vocational programs are available for inmates to better equip themselves for productive lives" (PXs 1-500, 3-04.10.101; Susner Tr. I 5-7, 12).

57. In keeping with those policies, defendants have made available to Stateville's general population inmates the full spectrum of vocational courses offered by the Education Department. Vocational training teaches inmates job skills, both to qualify them for certain jobs within the institution and to prepare them for legitimate employment upon their release. Vocational classes currently available to general population inmates include barbering, welding, small engine repair, graphic arts and building maintenance, which includes training as a plumber or electrician. All the equipment needed to reach vocational training programs is maintained in the vocational education center (Stip. ¶27; PX 8A; Susner Tr. I 74-75, 79-81; DeRobertis Tr. 155-56). Stateville's Education Department also offers a career planning program, which evaluates an inmate's vocational interests and abilities so that he can be assigned to a vocational training program (Susner Tr. I 71-72).

58. In like manner, defendants have made available to Stateville's general population inmates the full spectrum of academic courses offered by the Education Department. Since at least 1979 defendants have made available to general population inmates:

> (a) classroom instruction in Adult Basic Education ("ABE") and General Education Development ("GED") on an open-entry, open-exit basis;
>
> (b) classroom instruction programs designed for younger inmates who read below a seventh grade level; and

(c) college level courses leading to degrees of Associate of Arts or Bachelor of Arts.

(Stip. ¶26; PXs 8A, 35; Susner Tr. I 16, 18-23, 54; Susner Tr. II 11-15).

59. Defendants hold all classes for general population inmates at the Education Center, which has 17 classrooms. That classroom setting serves a valuable function and is more conducive to learning than individual study because of the interaction among the class members. Indeed, although some learning can take place under other conditions, a classroom setting may fairly be viewed as "essential" to obtaining an effective education (Susner Tr. I 23, 54; Susner Tr. II 14-15).

60. Since 1979, defendants have paid $15 per month to each general population inmate assigned to educational programs on a full-time basis. Any general population inmate may participate in educational programs on a part-time basis, even if he has a job assignment, and receive the greater pay available for working the job (Susner Tr. I 63-64, 67).

61. Before May 1979, while protective custody inmates were housed in Cellhouse E, the opportunities for academic education were essentially equivalent to those afforded the general population. Each day a "line" of such inmates went to the Education Center for regular classroom instruction (Stip. ¶13; Williams Tr. 186-87). As the following Findings show, since May 1979 the vocational and academic programming available to protective custody inmates has been significantly inferior to that afforded the general population. Although O'Leary purports to list vocational education as his top priority for protective custody inmates, defendants have never offered such programs to plaintiffs. Nor have defendants ever made the career planning program or any college level degree programs available to plaintiffs (PX 11; Huff Tr. 215-16; O'Leary Tr. 137; Susner Tr. I 63, 72-73, 82; Wells Tr. 37).

62. From May 1979 through January 1983 plaintiffs received no classroom instruction of any type. During that

period protective custody inmates had access to ABE and GED only by individual cell study, an arrangement under which teachers would occasionally visit the galleries, stand in front of the inmate's cell and answer the inmate's questions on the materials. While disciplinary segregation inmates were housed in Cellhouse B-West, defendants focused academic educational programming on them, not on protective custody inmates. Many protective custody inmates became disenchanted with the system because they quite understandably found they could not use the cell study materials effectively (Susner Tr. I 25-26; Susner Tr. II 31; Thomas Tr. 94).

63. Because he recognized the educational services being provided to plaintiffs were "minimal" and because a large number of the plaintiffs had expressed interest in educational programs, Stateville's education administrator proposed to defendants in May 1982 that the Education Department begin regular classroom instruction for protective custody inmates. However, no classroom instruction was permitted until January 1983, when the room at the back of Cellhouse B-West was opened (see Finding 34) (PX 36; Susner Tr. I 29-31).

64. Beginning in January 1983 defendants permitted classroom GED instruction for plaintiffs. Because the class was limited to 15 inmates, there was a waiting list. In mid-1983 defendants ordered GED classroom instruction discontinued for all inmates and had GED taught by closed-circuit television instead (Susner Tr. I 48-51).

65. In January 1983, solely to satisfy the *Meeks* Decree, defendants permitted a single college level course to be offered to plaintiffs. Since moving the protective custody unit to Cellhouse H in January 1985, however, defendants have offered no college courses to plaintiffs. Defendants have once again permitted plaintiffs GED classroom instruction, with the classes held in the cellhouse's converted garage. As for ABE, even though the Education Department believes it can deal more effectively with such students in a classroom setting and such classroom instruction had been offered since July 1983, in Cellhouse H the

offering has been confined to cell study (O'Leary Tr. 41; Susner Tr. I 51-56, 59-61).

66. Until July 1985 defendants paid plaintiffs $10 a month "idle pay," even when they participated in classroom instruction. In the fall of 1985 defendants finally started to pay plaintiffs educational pay of $15 per month, retroactive to July 1985. Through complaints written by plaintiff Williams and others, defendants had known since at least 1983 that protective custody inmates in educational programs were not being paid the $15 educational pay available to general population inmates in such programs. That difference in treatment—though perhaps not significant in a monetary sense—is all of a piece with defendants' total attitudes toward protective custody inmates, manifested in their testimony in this case (though never acknowledged by defendants): Whatever the source or cause of their mindset, they perceive protective custody inmates as a class entitled to fewer privileges, falsely rationalizing their treatment in terms of "security" considerations (PXs 41, 43; O'Leary Tr. 124-25; Susner Tr. I 67-68).

D. *Jobs*

67. Illinois' Code requires Department, insofar as possible, to employ inmates at useful work. "Such employment shall equip such persons with marketable skills [and] promote habits of work and responsibility. . . ." In connection with such programs, defendants must maintain "programs of training in various vocations and trades" and must "provide opportunities for training outside working hours" (Code §§1001-1-2(d), 1003-6-2(d), 1003-12-1, 1003-12-3).

68. To meet their statutory obligations, defendants have made jobs available to general population inmates as skilled workers, semi-skilled workers, clerical workers and general laborers. Defendants pay from $15 to $45 per month for those jobs, depending on skill levels and length of time on the job. Unassigned inmates receive $10 per month in "idle pay" (Stip. ¶30; PXs 3.05.03.103A, 10).

69. Before May 1979, while protective custody inmates were housed in Cellhouse E, they held a variety of jobs (such as gallery workers and cellhouse help) within the cellhouse (PX 50; Wheaton 1/30/86 Tr. 40-43; Williams Tr. 187). As the following Findings show, since May 1979 the job opportunities for protective custody inmates have been either nonexistent or significantly inferior to those offered to general population inmates (PX 11; Huff Tr. 215-16; Wells Tr. 37).

70. From May 1979 until November 1982 defendants made no jobs available to plaintiffs. Throughout that period plaintiffs received only idle pay of $10 per month. From time to time defendants used plaintiffs to do certain tasks around or near the cellhouse, but those tasks were labeled "voluntary" nonpaying jobs, carrying no pay but only the benefit of a potential award of good time (Stip. ¶31; PX 10; Flowers Tr. 30-31; Wheaton 1/30/86 Tr. 145-48; Williams Tr. 204-06).

71. In November 1982 defendants made available to plaintiffs a limited number of jobs as gallery help, food handlers and members of cleaning details on a 90-day rotating basis. Defendants made those jobs available solely because of the *Meeks* Decree (Stip. ¶32; DeRobertis Tr. 167; O'Leary Tr. 56, 74-75; Wheaton 1/30/86 Tr. 145; Wheaton 2/5/86 Tr. 139-40).

72. Defendants have never made available to protective custody inmates any jobs in prison industries or such skilled job categories as plumbers or electricians. Plaintiffs have frequently complained to the correctional staff that they want jobs to earn good time, help their chances for parole, earn money and get out of their cells (Flowers Tr. 30; O'Leary Tr. 56; Pedersen Tr. 257; Wheaton 1/30/86 Tr. 154).

73. Despite the mandate of the *Meeks* Decree, none of the defendants has developed any plan to provide jobs to protective custody inmates. Before becoming subjected to the complusion of the *Meeks* Decree, DeRobertis had done nothing to create job assignments for protective cus-

tody inmates because he did not want to take any jobs away from the general population. Defendants even permitted approximately 15 general population inmates formerly housed in Cellhouse H to keep jobs as Cellhouse H help, rather than providing those jobs to the protective custody inmates who had been moved there (DeRobertis 11/28/84 Dep. 92, 94; DeRobertis Tr. 175; O'Leary Tr. 110-11; Wheaton 10/30/85 Dep. 59-50).

E. *Conditions*

74. Because out-of-cell recreation is a basic service critical to inmates' well-being, Illinois' Code requires defendants to provide every inmate with the opportunity to leave his cell for at least one hour each day "unless the chief administrative officer determines that it would be harmful or dangerous to the security or safety of the institution." Other statutory provisions guarantee each inmate (a) at least one shower per week, (b) bedding, soap and towels and (c) a wholesome, nutritious diet at regularly scheduled hours (Code §§1003-7-2(a), (c), (d)).

75. General population inmates have access to a wide variety of recreational opportunities. Yard access is regularly available, often twice a day. Stateville'a new gymnasium, built in 1979, has two full-sized basketball courts, Universal weight machines, at least one ping-pong table, one pool table and a music room. There is also an auxiliary gym with free weights and boxing equipment. Dayrooms in most general population houses are available for leisure time use and are stocked with weights (Wheaton 1/29/86 Tr. 197, 203; Wheaton 1/30/86 Tr. 5-6).

76. Defendants offer numerous other leisure time activities to general population inmates. In addition to the general library, there are chess and checker tournaments, art shows, movies, sports tournaments and picnics (Flowers Tr. 14-16; Godinez Dep. 107-08).

77. Before May 1979, while protective custody residents were housed in Cellhouse E, they (like general population inmates) had both regular day yard and night yard.

They also had regular use of the "old gym" located in the central rotunda area of the institution from 8 p.m. to 10 p.m. twice a week. They were also permitted to play checkers or cards on folding tables in the dayroom when they finished their job assignments for the day (Williams Tr. 182-85). As the following Findings show, since May 1979 the protective custody inmates' opportunities for out-of-cell recreation have been significantly inferior to those offered to general population inmates.

78. While plaintiffs were housed in Cellhouse B-West, they were scheduled for yard privileges once per day, but they were often denied such access, particularly if disciplinary segregation inmates had caused disturbances. At other times weather conditions made it virtually impossible for plaintiffs to go when yard was offered. Plaintiffs did attend movies once a week in the "old gym" portion of the central rotunda area (Flowers Tr.15-16; Wheaton 1/30/86 Tr. 87-88; Williams Tr. 193-94).

79. Until January 1985 defendants made no indoor alternatives to yard recreation available to plaintiffs. They have never permitted plaintiffs to use either of the two gyms, nor did they generally permit the use of flags (the ground-level area within a cellhouse), galleries or other areas in Cellhouse B for recreation by protective custody inmates. For a short time the then Cellhouse B superintendent allowed recreation at the back end of the flag for the 30-40 protective custody inmates in Cellhouse B-East, but defendants discontinued the program when that superintendent was transferred. No attempt was ever made to renew any similar type of flag area recreation (DeRobertis Tr. 177-78, 198; O'Leary Tr. 112-14, 117, 143-45; Wheaton 1/30/86 Tr. 6, 83-84).

80. Since the unit was moved to Cellhouse H in January 1985, protective custody inmates have received about 1¼ hours of dayroom or yard access on alternate days. Defendants provide no recreation on Sundays, though there are no security constraints preventing it. Cellhouse H's yard is smaller and allows for fewer activities than the yard in Cellhouse B, and defendants continue to make

the gym and all other recreational programs unavailable to protective custody inmates (Pedersen Tr. 264; Wheaton 1/30/86 Tr. 84-85; Wheaton 2/5/86 Tr. 118-19).

81. Before May 1979, while housed in Cellhouse E, protective custody inmates ate in one of the dining rooms in the central rotunda area, as did the general population. Access to the dining area was through the Cellhouse E tunnel, then across the rotunda corridor to a doorway into the dining room directly facing the tunnel. Security could be provided by sealing off the rotunda corridor by remote-controlled security gates monitored by television cameras and by guards posted in the area (Wheaton 1/29/86 Tr. 195-96; Williams Tr. 180-82). As the following Findings show, since May 1979 the food service for protective custody inmates has been significantly inferior to that afforded general population inmates.

82. Since May 1979 defendants have forced protective custody inmates to eat all meals in their cells except on two occasions—once when such inmates were fed in the central rotunda "old gym" and once on a Thanksgiving when, solely for administrative convenience, such inmates were allowed into the dining hall to get food to take back to their cells. As for the "old gym," it had tables and chairs already set up and, in fact, was used to feed general population inmates during renovation of the existing dining rooms in 1984-85. Access to the "old gym" was directly across the rotunda corridor from the Cellhouse B tunnel. As they did when protective custody residents went to the movies there, defendants were able to provide both access and security in the same way they did so for the dining hall in the same rotunda during the period protective custody inmates were in Cellhouse E (DeRobertis Tr. 132; O'Leary Tr. 50-52, 119-20; Thomas Tr. 107-08; Wheaton 1/30/86 Tr. 135-44; Williams Tr. 191-93).

83. In Cellhouse B and until very recently in Cellhouse H, the delivery of food to protective custody inmates in their cells—given the fact it was prepared elsewhere and had to be transported some distance, with several potentials for delays—frequently caused hot food to be served

cold or in an otherwise unpalatable condition. Despite their early recognition of that obvious problem, defendants did little to correct it. Finally, in November 1985 they procured heated food carts to deliver food to protective custody inmates. Such carts had long been available, but defendants had rejected their use. Though such use did pose some logistics problems, this was still another instance of defendants' discriminatory frame of reference as to protective custody inmates (see Finding 66) (PXs 54-72; Flowers Tr. 19-20; Morrison Dep. 23, 34, 102, 110; O'Leary Tr. 118; Thomas Tr. 108-09; Wheaton 1/30/86 Tr. 117-21; Williams Tr. 191-92).

84. Before May 1979, while protective custody inmates were housed in Cellhouse E, they received showers four to five times a week, particularly after yard or the completion of a job assignment. Defendants converted cells at the end of several galleries for individual showers. Group showers were also located in the basement area. Laundry was picked up once a week (Williams Tr. 179-80, 185).

85. Between May 1979 (when the protective custody unit was moved to Cellhouse B-West) and January 1985 (when the unit was moved to Cellhouse H), the shower and laundry services to protective custody inmates were erratic and less frequent than described in Finding 83 for the pre-May 1979 period (Stip. ¶36; Flowers Tr. 8-10, 16-19; Williams Tr. 191, 194-95, 212). Since the move to Cellhouse H, though, daily showers and weekly laundry services have been available to plaintiffs. There have been periods, however, when there was no hot water (Thomas Tr. 111; Wheaton 2/5/86 Tr. 120).

## III. *Security Concerns*

### A. *General Security Problems of a Maximum Security Institution*

86. As a maximum security prison housing inmates drawn from among the worst offenders in Illinois, Stateville presents understandable security concerns. Confine-

ment in a tightly-controlled institution can increase tension and thus the danger of violent behavior. There are a large number of mutually hostile gangs in the institution, with gang affiliation running as high as 85% (DeRobertis Tr. 109-10; O'Leary Tr. 9-10).

87. General population prisoners face a day-to-day threat to their safety—usually incapable of being identified and particularized in advance—simply from being incarcerated at Stateville. Using the principles of modern penology, defendants have employed a wide range of means for dealing with that inherent threat. First and most obviously, there are ever-present direct security measures, including the guards, restraint systems and "shake-down" searches. Second, there is prison intelligence, accumulated primarily through informants. Third, there are institutional management techniques, such as specified periods for inmate movement, a pass system and, particularly after the afternoon count, strict controls on all inmate movement (O'Leary Tr. 61-62, 78-79, 81; Wheaton 2/5/86 Tr. 183).

88. All the techniques referred to in Finding 87 help minimize, but cannot eliminate, the generalized threat to general population inmates. Inmates and staff must live with the dangers within the institution on a daily basis. Defendants cannot stop individual acts of violence. They can only institute reasonable and prudent procedures to contain violence and the threat of violence. Although general lockdowns would reduce inmate-to-inmate contact and thus eliminate some of the danger, defendants have opted not to lock down the institution except when absolutely necessary to respond to a specific disturbance within the institution of when a general search is called for (DeRobertis Tr. 205-06; O'Leary Tr. 81-82).

89. One reason for not locking down Stateville more frequently is that severe restrictions on inmate movement and activity are likely to be counterproductive and self-perpetuating. Defendants have therefore recognized that while the extreme measure of lockdown is always available, it is highly undesirable. Idleness and isolation tend

to create inmate tension and a concentration of violence during the times inmates are together. Just as security is necessary for successful programming, programming is necessary for security (Godinez Dep. 107; O'Leary Tr. 62, 65-66, 82-83; Wells Tr. 81).

B. *General and Special Security Problems of Protective Custody Inmates*

90. Once incarcerated at Stateville, inmates who are ultimately assigned to protective custody must continue to face a general unidentified threat to their security (that is, one usually incapable of being particularized and identified *in advance*), just as general population inmates do. Even though isolated from the general population, protective custody inmates may still face a general unidentified threat from other protective custody inmates. Protective custody inmates fight, as to general population inmates, and may be subjected to the additional security techniques applied to the general population, such as confinement in disciplinary segregation. Protective custody is not a guaranty that an inmate will be insulated from the general dangers of life in a maximum security prison (Wells Tr. 61, 69).

91. Protective custody is not intended to eliminate the generalized threats that apply to all inmates equally, but rather to protective custody inmates from a second level of danger, which is the reason for their placement in protective custody. Unlike the generalized unidentifiable threat, the second level of danger has been identified or is identifiable and specifically substantiated. Defendants know what the danger is. It is from that danger only that plaintiffs have a right to expect additional protection beyond that afforded general population inmates (O'Leary Tr. 79-81).

92. Additional security measures are necessary to safeguard plaintiffs from the second-level threat. Because that level of danger ordinarily comes from the general population, the bulk of the concerns can be addressed by limiting

protective custody inmates' interaction with the general population. At times, the source of the identified danger may be from an inmate who is himself at risk and thus also housed within protective custody. In such cases, defendants must use institutional management techniques to keep the inmates separated (Wells Tr. 66).

93. Except for the need for added techniques to deal with the special problems referred to in Finding 92, the techniques defendants used in the case of general population inmates, to address the generalized threat applicable to all Stateville inmates, can and do work with protective custody inmates as well. When protective custody inmates were housed in Cellhouse E, for example, security was stringent. Protective custody residents did not feel threatened by the general population or by other protective custody inmates when participating in the various activities in groups. Although defendants regarded Cellhouse E as a relatively unsafe house, there is no record of any significant incidents or of gang violence in that cellhouse. And that was so in an institution that defendants otherwise characterized as "up for grabs" and "not in control" in 1979 (DeRobertis Tr. 104-05; Lane Tr. 51; Williams Tr. 187-89).

### C. *Defendants' Professed Concerns with, and Exaggerated Responses to, the Special Security Problems of Protective Custody Inmates*

94. As various previous Findings have indicated and as later Findings will reflect as well, every administrative step defendants have taken or failed to take in providing housing and programmatic accommodations for protective custody inmates has been sought to be explained by them during the trial as security-motivated and security-oriented. Those rote explanations have been so all-embracing and Pavlovian in nature as to make it difficult for this Court to determine (a) in which instances (limited at best) they represent defendants' credible and actual reasons for action or inaction, (b) in which instances they may have initially represented defendants' actual reasons for action

or inaction, but were shortly thereafter overtaken by defendants' substitution of inertia—unwillingness to change—for the required thoughtful and reasoned response to the rights and needs of protective custody inmates and (c) in which instances they have not been credible or bona fide from the outset—they simply mask defendants' post-hoc rationalizations for courses of action or inaction that were simply easier to follow, less trouble and not at all truly responsive to security needs and concerns. Regrettably this Court finds categories (b) and (c) far outnumber category (a). DeRobertis and O'Leary have been particularly lacking in credibility in explaining their decisions in "security" terms and in not facing up to the need to change policies and procedures.

95. With the move of the protective custody unit to Cellhouse B-West, defendants essentially abandoned their focus on the identified and identifiable threats to protective custody inmates. Defendants have concentrated instead on the general concerns they have decided they can live with in the case of the general population. Defendants have chosen to treat protective custody inmates with the same extreme security procedures they applied to disciplinary segregation inmates, who generally spend at least 23 hours per day in their cells. That policy and its initial implementation caused a dramatic deterioration of conditions and the elimination of most programming for protective custody inmates, and any later improvements in those respects have been wholly inadequate (PX 11; DeRobertis Tr. 107; Williams Tr. 189). In acting as they have, defendants reacted in precisely the manner they have rejected and found unacceptable in dealing with general population inmates. Instead of accommodating themselves to the realities of institutional life, defendants have severely restricted plaintiffs' movement and access to programs in a manner that, in the case of general population inmates, defendants have concluded is counterproductive and highly undesirable (Wells Tr. 37, 81-83; Godinez Dep. 107).

96. Indeed, by applying their restrictive measures inconsistently, defendants have themselves demonstrated such extreme measures were neither appropriate nor necessary to address the second-level threat applicable to protective custody inmates. The defendants refused to allow such inmates to participate as a group in some programs, while in others they were willing to do so. Nor was there any logic to their decisions to do so or not to do so (O'Leary Tr. 131-33; Wheaton 2/5/86 Tr. 128). For example (simply by way of illustration and not as an effort to be exhaustive):

(a) Defendants refuse to allow plaintiffs to go to the library as a group at a time dedicated solely for protective custody use. Nevertheless, defendants did allow as many as 60 protective custody inmates at a time to go to yard while they were housed in Cellhouse B-West. Particularly given the nature of yard activity, it clearly was not more dangerous to allow plaintiffs to go to yard together than it would be for them to go to the library together (Flowers Tr. 37; O'Leary Tr. 83; Thomas Tr. 148-49; Wheaton 2/5/86 Tr. 128-29).

(b) During an extended period after protective custody inmates moved from Cellhouse E to Cellhouse B, defendants continued to allow "a fairly large number" of them to go to movies once a week in the "old gym" in the central rotunda area. On those occasions they sat in a darkened room. In certain instances, they were even mingled with general population inmates from the orientation unit. No special security measures were taken. Nevertheless, defendants refused to take plaintiffs to eat communally in well-lighted dining areas adjacent to the "old gym" or in the "old gym" itself. It was not more dangerous to feed plaintiffs in the "old gym"than it was to bring them to the movies (DeRobertis Tr. 196-97, 202-03; O'Leary Tr. 119-21; Wheaton 1/30/86 Tr. 76, 135-39).

(c) Even today defendants allow the protective custody inmates within each wing of Cellhouse H to ex-

ercise and use the dayrooms together. Yet if a meal arrives while they are in the dayroom, the inmates are ordinarily required to go to their cells and eat and are permitted to return to the dayroom only when the meal is finished. It is clearly not more dangerous for those inmates to eat together in the dayroom than it is for them to exercise together there (O'Leary Tr. 50-51; Wheaton 1/29/86 Tr. 202-03).

97. When the matter is viewed in terms of the particularized concerns that are the raison d'etre of protective custody status (as contrasted with the more generalized threat that all Stateville inmates must face), the inferior conditions and programming that defendants have imposed upon protective custody inmates cannot be justified in the terms by which defendants have sought to mask their real bases for decision (see Finding 94). Later Findings are merely illustrative of options defendants appeared to have, but never sought to exercise, for providing programs in a manner consistent with meeting the legitimate safety concerns of Stateville and its protective custody inmates, while still providing them with conditions and programs comparable to those afforded the general population. Many of those options clearly presented little or no security concerns of their own. In many cases, however, defendants failed even to consider possible options or rejected them for reasons having nothing to do with security. Moreover, defendants time and again demonstrated the ability to overcome security and operational concerns when they chose to do so.

98. In summary, in light of the preceding Findings, it is clear the inferior access of plaintiffs to religious programs and the law library, and the substantial disparity in conditions and programs for protective custody inmates compared with those for the general population, stemmed not from defendants' misperception of the purpose of protective custody, but rather from a lack of desire or concern, or from affirmative neglect, on the part of the defendants.

D. *Programming Alternatives for Protective Custody Inmates*

99. It is not this Court's function to assume responsibility for managing Stateville. That remains defendants' duty. Most particularly, the choice of means for affording protective custody inmates the constitutional rights to which they are entitled—religious freedom, access to the courts, due process of law and equal protection of the laws— is for defendants to make. It is thus possible some of the potential alternatives identified in later Findings might have been unavailable because of legitimate security concerns, or other proper institutional concerns, if defendants had been exercising their discretion properly, rather than in the manner described (for example) in Findings 94 and 98. Accordingly, the following Findings reflect alternatives that appear to have been available to defendants, and are not a conclusive determination of such availability.

100. It appears defendants had several available alternatives that could have provided comparable conditions and programming to plaintiffs without jeopardizing the security concerns properly applied to protective custody inmates:

(a) Thus it seems defendants could have provided programming the plaintiffs in their own cellhouses, where a variety of usable space existed that might well have been converted to activity space (Wells Tr. 42-43, 46, 54-55):

(1) In Cellhouse B-West defendants could have had activity rooms built on the flag, which is over 400 feet long and 16 feet wide. They chose to have structures built there for correctional staff offices (Wells Tr. 41-42; Wheaton 1/30/86 Tr. 9).

(2) Cells could have been converted into activity space (some are currently used for storage and offices). Cell walls could have been knocked down to convert a block of cells into an activity room (Wells Tr. 42, 54).

(3) Cellhouse B-West had a large transit area (approximately 56 × 16), with a secure location off of 7 and 9 galleries where plaintiffs were housed. Cells in the transit room (which for over 20 years have been used only for storage) could have been removed and the transit area easily converted into activity space (Wells Tr. 55; Wheaton 2/5/86 Tr. 173-75).

(4) All the preceding alternatives might perhaps have posed problems (other than defendants' lack of thought or imagination). But the same cannot be said of the fact defendants could have constructed the room in the back of Cellhouse B-West much earlier. It also appears they could have built additional rooms on one or more galleries above the Cellhouse B-West room to provide additional activity rooms. Defendants might have also utilized the space at the back of Cellhouse B-East for protective custody programming (PX 87; Wells Tr. 42-43).

(5) Cellhouse H provides readily apparent opportunities for various activities and communal dining in the 12 dayroom areas and interview rooms (Wells Tr. 46).

(b) Apart from the cellhouses themselves, it would seem correctional staff could escort protective custody inmates to various activity areas. Through the judicious use of scheduling, contact with general population inmates could be prevented or severely restricted during such movement (Wells Tr. 43, 45, 57-58, 65; Wheaton 2/5/86 Tr. 182-83).

(c) As another (though less desirable) alternative, defendants could have considered the selective commingling of protective custody inmates with the least aggressive general population inmates under proper supervision by correctional staff. Such commingling had already been done in certain circumstances, such as at the movies shown in the "old gym" (O'Leary Tr. 119-21; Wells Tr. 115).

101. Alternatives would also appear to have been available to provide adequate (and comparable) religious programming to plaintiffs. For example:

(a) Defendants could have provided additional religious programming in the cellhouse in any of the potential program areas described above. Thus a cell in Cellhouse B-West, or in the interview rooms in Cellhouse H, could have been made available for private counseling with clergy.

(b) Defendants could have escorted plaintiffs to the Chapel after the afternoon count. Fences and gates along the route from Cellhouse B-West to the Chapel could have prevented general population inmates from having access to plaintiffs.

(c) Defendants could have considered commingling plaintiffs with the least aggressive general population inmates at religious services in the Chapel. As long as there was sufficient supervision by correctional staff, there would be no unreasonable threat to the plaintiffs' safety beyond that ordinarily present for Stateville inmates.

(DeRobertis Tr. 190-92; Wells Tr. 43, 47-48, 51, 115; Wheaton 2/5/86 Tr. 180).

102. Alternatives would also appear to have been available to give plaintiffs meaningful (and comparable) access to the law library. Again by way of example:

(a) Protective custody inmates could have been scheduled for the library one day per week (as is done for each of the other cellhouses) or during the weekend when the library was not being used. Because the library could be locked and made secure, general population inmates would not have access to plaintiffs.

(b) Defendants could have considered commingling plaintiffs with the least aggressive general population inmates in the library, with supervision by security staff.

(c) Defendants could have supplemented general library access by setting up a satellite law library in the protective custody cellhouse, using cells, the transit room or the back-end space in Cellhouse B-West or the dayrooms or interview rooms in Cellhouse H. Such a satellite law library would satisfy any security concerns raised in sending a particular protective custody inmate with a larger group to the library. It would also have created opportunities for plaintiffs to have clerk jobs and to obtain paralegal training.

(Johnson Tr. 66, 92; Wells Tr. 60, 64-65, 115).

103. Alternatives also appear to have been available to provide comparable vocational and educational training to plaintiffs. For example, defendants could have made available in the cellhouse educational classes and light vocational training, such as leathercraft, shoe repair, typing, word processing, court reporting or computer programming. Such programs were suggested to DeRobertis by his staff in 1982, but he rejected them without explanation. Such academic and vocational classes could be held in any of the potential program areas in Cellhouse B-West or in the dayrooms in Cellhouse H. Defendants could also have escorted plaintiffs to the educational or vocational center after 3:30 p.m. (PX 52; Wells Tr. 47, 57-58).

104. Alternatives also appear to have been open to defendants in the area of providing comparable job availability to plaintiffs. They can unquestionably hold a variety of jobs in their own cellhouses, such as the cellhouse help jobs not provided to them until after November 1982 (no adequate explanation was given for not providing such jobs earlier). Moreover, cottage-industry-type jobs, such as leathercraft, clothing stenciling, shoe repair, tailoring, book repair and furniture repair could have been offered in the protective custody cellhouse or even in each inmate's cell. Such jobs would also have provided plaintiffs with employment skills upon their release. Plaintiffs could also have been assigned to jobs in prison industries on

a shift separate from the general population (PX 52; DeRobertis Tr. 168-71; Wells Tr. 73).

105. Additional out-of-cell recreation would appear to have been available to plaintiffs in alternative ways too. Plaintiffs could be escorted to the gym after 3:30 p.m. Even were that not feasible, out-of-cell recreation could be available in plaintiffs' own cellhouse. In Cellhouse B-West tables and exercise equipment could have been placed on the flag (ping pong tables are now in a fenced-off portion of the flag at the end of Cellhouse B-East). Defendants could put exercise equipment in the dayrooms in Cellhouse H (Wells Tr. 65, 67).

106. Finally, communal dining for plaintiffs would similarly seem to have been feasible in alternative ways. Plaintiffs could be escorted to the dining room and fed at a time separate from general population inmates. Tunnels from Cellhouse B-West to the dining room could have been locked to prevent the general population's access to protective custody inmates while they are being escorted to the dining room. That was in fact done when plaintiffs were housed in Cellhouse E (DeRobertis Tr. 192; Wells Tr. 68). Alternatively, before renovation of the dining room plaintiffs could have been fed in the "old gym." Plaintiffs could also have been fed on the flag of Cellhouse B-West, either by moving the general population inmates residing on 1 gallery to a different gallery or by subdividing 1 gallery by a fence into protective custody and general population sides. Now that protective custody inmates are housed in Cellhouse H, defendants could feed them in the dayrooms, as they did with orientation inmates when they were housed in Cellhouse H. Cleaning the mealtime debris would provide jobs for plaintiffs (Pedersen Tr. 255-57; Wells Tr. 68-69, 71-72).

E. *Defendants' Makeweight Excuses for Their Inaction*

107. As the following Findings reflect, defendants failed to pursue any of the alternatives apparently available to them to provide comparable conditions and programming to protective custody inmates:

(a) Defendants simply ignored or neglected alternatives that were readily apparent even to nonprofessionals and should have been doubly so to defendants.

(b) Many of the "security" concerns defendants have raised, seeking to explain away alternatives they say they did consider, are implausible and must be discredited.

(c) In many cases defendants admit their reasons for not pursuing an alternative are not related to security concerns at all.

As before, the ensuing Findings are merely illustrative, not exhaustive.

108. Defendants never gave consideration at any time to rescheduling programs to accommodate protective custody inmates (who, it will be recalled, average 10% of Stateville's total population). Defendants looked only to whether such scheduling might inconvenience general population inmates and never to what balance might be struck between the competing interests of the two groups. For instance, defendants refused to reserve the library on weekends for plaintiffs' exclusive use, simply because general population inmates sometimes use that facility for special programs (DeRobertis Tr. 127; Hall Dep. 37-38; O'Leary Tr. 122-23).

109. Before mid-1982 defendants failed to consider any use of the spaces at the back of Cellhouse B-West or B-East for protective custody programming. They never at any time considered using the transit room for those purposes, even though it was directly off 7 gallery (which housed the protective custody inmates), was secured by three gates and had not been used for anything but storage for twenty years. Indeed, defendants preferred to keep the transit room as it was, simply on the off chance that its cells might someday be used again (DeRobertis Tr. 123, 177-82, 184-85, 198; Wheaton 2/5/86 Tr. 174-76).

110. Defendants similarly never considered use of the Cellhouse B-West flag area for protective custody unit recreation, even though in 1981 the cellhouse superinten-

dent had successfully experimented with a flag recreation program for plaintiffs housed in Cellhouse B-East. Defendants never considered constructing a program room on the flag, nor did they consider converting cells and constructing a room around them, even though they did just that when they needed additional medical rooms (DeRobertis Tr. 122-23, 176, 183; O'Leary Tr. 116-18; Wheaton 1/30/86 Tr. 11, 87, 92-94, 172-74; Wheaton 2/5/86 Tr. 173-74).

111. Defendants also never considered using other facilities near Cellhouse B for protective custody programming. Thus defendants never considered (a) expanding plaintiffs' use of the "old gym" from once-a-week movies to occasional communal dining or (b) using the old bakery located just at the end of the tunnel from Cellhouse B-West or (c) using the old chapel building (which they developed instead into a general population arts center) (DeRobertis Tr. 194-96; O'Leary Tr. 119-21; Wheaton 1/29/86 Tr. 183-86; Wheaton 2/5/86 Tr. 173).

112. Where defendants say they did consider but then rejected alternatives, the "security" reasons they advanced for such rejection are implausible and unreal—or at least materially exaggerated. That was true of a number of dangers defendants said were necessarily associated with moving plaintiffs in significant numbers:

(a) Thus defendants *did* move significant numbers of protective custody inmates to yard, to the movies, to GED tests and to a regular stress management class held near the administration building. Such movement presented no risks beyond the generalized ones applicable to all inmates at Stateville (DeRobertis Tr. 202-03; Flowers Tr. 16, 45, 50-51; O'Leary Tr. 83; Wheaton 2/5/86 Tr. 128).

(b) Defendants' asserted fears of general population inmates "lurking" in areas where they would be a threat to plaintiffs being moved are also plainly overstated. Defendants offered no reasonable predicate for finding it unreasonably dangerous to move plaintiffs

from Cellhouse H to the nearby library facility on weekends. Given defendants' procedures for controlling all inmate movement, there is no reason to expect general population inmates to be in the area between those buildings and no reason that general population inmates cannot be kept from that area at the relevant times.

(c) In like manner, defendants appear to have exaggerated the security concerns in moving plaintiffs from Cellhouse H to the program areas at the back of the institution late in the day, in the evening or even at night. For example, after 3:30 p.m. there are no valid inmate passes and all general population movement must be supervised. Inmates on evening work details are chosen according to behavioral patterns and overseen by security guards. For a large amount of the time, general population inmates are busy moving between their cellhouses and the dining rooms in the front of the institution for their evening meal, so they are not near or could be kept from these program areas (O'Leary Tr. 16-18; Wells Tr. 48-49; Wheaton 2/5/86 Tr. 182-83). After 9:00 p.m. there is little or no general population inmate movement except for pre-selected and closely supervised work details. Defendants have successfully moved plaintiffs at that time, particularly for their own work details. Such movement has occurred to places as distant from Cellhouse H as the main administration building (O'Leary Tr. 74-75; Wheaton 2/5/86 Tr. 139-40).

(d) Defendants' stated concerns about "blindspots" on some of the routes to be travelled by plaintiffs also appear overstated. Defendants characterize those areas as blindspots because guards in the perimeter towers are screened from observing whether general population inmates may be lurking in them. Guard tower observation, however, is not the only method to secure those areas. Effective use of television monitors, which defendants use elsewhere in the in-

stitution, or the stationing of guards would appear to eliminate any such "blindspots" (Wheaton 1/29/86 Tr. 190; Wheaton 2/5/86 Tr. 182).

113. Defendants admitted several available alternatives present no security concerns at all:

(a) No security concerns prevented the establishment of satellite law libraries, the provision of lists of the books in the law library and the general library, or the offering of vocational courses in the cellhouse in the same manner GED classes have been provided.

(b) Although in court defendants claimed to be concerned that a course such as typing may present security problems from the misuse of typewriters, they have always permitted inmates to use typewriters in the library and to have them in their cells.

(c) Security concerns likewise do not prevent denominational religious services.

(DeRobertis Tr. 127-28, 168-72; O'Leary Tr. 46-47, 76-78; Williams Tr. 199-200).

F. *Implications from Defendants' Own Conduct*

114. Some of defendants' own conduct has belied their professed current reliance of "security concerns." Between 1982 and 1985 defendants made a number of improvements in protective custody conditions in response to the compulsion of the *Meeks* Decree and the pressure of this lawsuit. They expanded religious opportunities, educational opportunities, jobs, showers and indoor recreation. In each instance defendants' solution was one that had long been available to them. Their decisions to make improvements were prompted not by a desire to meet their constitutional and statutory responsibilities, but by the pressure of *Meeks* and this action (DeRobertis Tr. 114, 167, 175, 177, 188-90; Susner Tr. I. 55-56; Wheaton 2/5/86 Tr. 136). Further Findings in this section, which in part trace the history of protective custody housing and programming

in relation to the history of this action, are both illustrative and confirmatory of that fact.

115. Defendants made their original decision to house protective custody inmates in Cellhouse B-West not for security reasons, but because it was an "easy" way to handle such inmates. During the ensuing three years defendants made very few changes in conditions and provided essentially no programming for protective custody inmates, often citing the presence of the disciplinary segregation inmates in Cellhouse B-West as the reason for their refusal to make improvements (DeRobertis Tr. 106-07; Williams Tr. 210-11).

116. In January 1981 Williams, who had previously sought to obtain relief via letters and grievances, filed this lawsuit pro se. In July 1981 defendants entered into the *Meeks* Decree. Significantly, the *Meeks* Decree did not require full compliance at Stateville until July 1984.

117. Defendants initially moved to dismiss Williams' pro se complaint. This Court appointed counsel from the law firm of Kirkland & Ellis to respond to the pending motion and to consider filing an amended complaint. As part of their initial effort to investigate the case, in February 1982 Williams' counsel secured an order from this Court to inspect the prison. They did so in March 1982. On April 30, 1982 an amended Complaint with class allegations were filed (Initial Cplt.; Orders of 11/24/81 and 2/22/82; Cplt.).

118. Defendants then moved to dismiss the amended Complaint, primarily asserting the *Meeks* Decree mooted this litigation. After this Court denied defendants' dismissal motion, discovery began in earnest, with plaintiffs serving comprehensive document requests and interrogatories on defendants (548 F.Supp. 927 (N.D. Ill. 1982); 96 F.R.D. 383 (N.D. Ill. 1982)). Defendants responded with uncooperative and dilatory discovery tactics, meanwhile making limited and selected improvements in protective custody conditions and programs in an effort to deflect concerns regarding their compliance with *Meeks* and to moot this action.

119. It was thus not accidental that in April 1982 defendants took an initial step of moving disciplinary segregation inmates out of Cellhouse B-West to Cellhouse F, moving general population inmates into Cellhouse B-West to replace them. Defendants then expanded the shower schedule and laundry services became more regular. In June 1982 visiting clergy were permitted to visit protective custody inmates for the first time since early 1979 (Stip. ¶16; DeRobertis Tr. 139-40).

120. In June 1982 Stateville's Senior Chaplain Reverend Ledford adopted a plan to escort protective custody inmates to the chapel building to attend communal religious services. Reverend Ledford's plan was initially approved by Godinez, but DeRobertis later ordered the Ledford plan rescinded for reasons having nothing to do with security (PX 22; Ledford 1/28/86 Tr. 75-78).

121. Thereafter defendants first began to consider the construction of the multipurpose room in the previously-unused area at the back of Cellhouse B-West. In the summer of 1982 Reverend Ledford submitted a proposal for an amphitheater arrangement involving several tiers of seats rising up from a podium area. Although the Chaplaincy Department had been interested in finding a means of delivering improved programming to the protective custody unit since at least 1979, defendants took no action on the proposal until late fall of 1982 (PX 22; Ledford 1/28/86 Tr. 56-63, 64-60, 75-80, 88-89, 93-95).

122. In November 1982 plaintiff Williams' deposition was noticed. Approximately one week before the deposition date, protective custody residents began to receive hot cereal for the first time. On the day of the deposition Williams received his first job since the protective custody unit was moved to Cellhouse B-West. Shortly thereafter defendants ordered the room constructed in the unused space at the back of Cellhouse B-West—a room that took a very short time to build (Stip. ¶17; PX 87; Williams Tr. 205, 213).

123. In January 1983, as the *Meeks* timetable was running and discovery in this lawsuit was accelerating, defendants began using the room at the back of Cellhouse B-West for limited additional programming for protective custody inmates. Only at that point was a single nondenominational religious service started on Tuesday mornings. In addition, a college course in journalism was instituted for protective custody inmates (Stip. ¶¶21, 28).

124. Defendants made even the just-described improvements only grudgingly and to the minimum extent they believed necessary to fend off the pressure of the *Meeks* Decree and this lawsuit. For example, the room at the back of Cellhouse B-West suffered from a number of physical problems, including lack of heat in the winter, standing water and poor ventilation. Moreover, in June 1983 defendants completed the construction of new Cellhouse H and demolished Cellhouse C, one of the round cellhouses. Cellhouse H consists of three floors, having 100 cells divided among four quadrants, each quadrant having a dayroom with offices. Cellhouse H is separated from the rest of Stateville by a double perimeter fence, and access can be gained only by passing through a guard post. Although many aspects of the design of Cellhouse H are very well suited for protective custody, no consideration was initially given to housing plaintiffs there. Rather defendants attempted first to house general population and orientation inmates in Cellhouse H. Nor did defendants consider construction of a protective custody dining room, though the *Meeks* Decree required that such an option be considered (PXs 29, 30, 32, 84C; DX 3; O'Leary Tr. 25-26, 36, 73; Wheaton 1/29/86 Tr. 212-14).

125. By the end of 1984 this Court had ordered discovery closed in this case, scheduled the filing of the FPTO and proposed the setting of a trial date. At about the same time the unit superindendent for Cellhouse B suggested moving the protective custody unit to Cellhouse H. In approximately January 1985 O'Leary ordered that all protective custody inmates be moved to Cellhouse H (Stip. ¶18; O'Leary Tr. 73; Wheaton 1/30/86 Tr. 59-60).

126. Lane's conduct elsewhere in the state prison system provides a sharp contrast between defendants' ordinary inaction and their ability to make improvements when they have been inclined to do so. Approximately three years ago Lane decided he wanted protective custody inmates at Menard to have more out-of-cell recreation. Notwithstanding "very sound rational security and operational reasons" presented by the Menard administration against improvement, Lane "brainstormed" with the Menard administration until they concluded a protective custody yard could be built. In Lane's view he "overcame every obstacle" because he "felt it had to be done" (Lane Tr. 66).

127. In summary, while some security concerns at Stateville may in some cases be legitimate in the abstract, defendants' reliance on them in this case to explain their treatment of protective custody inmates has been exaggerated, at times arbitrary and in several instances wholly pretextual. This finding is buttressed by (a) the unwarranted excessive security applied to protective custody inmates, (b) the large number of apparently available alternatives, (c) the failure even to consider certain unquestionably available alternatives, (d) the unjustified concern expressed for security in some cases when it does not exist, (e) the admitted absence of security concerns in many of the apparent alternatives and (f) defendants' demonstrated ability to overcome security and operational concern when the desire exists. All those factors, along with defendants' demeanor as witnesses, demonstrate that their parroted fallback on "security" at every juncture represents a mindset about protective custody that stems ultimately from a lack of desire or, worse, an affirmative decision to neglect protective custody inmates.

128. This Court discredits defendants' statements to the contrary. It has evaluated the credibility of defendants' "security" claims against the objective facts, taking into account defendants' demeanor on the witness stand. Defendants have repeatedly demonstrated by their words and conduct that they handled protective custody the way

they did not because of legitimate security concerns, but rather because they did not care about improving (or even worse, did not want to improve) the conditions and programs available to plaintiffs. In some instances defendants affirmatively decided to keep conditions and programs for protective custody inmates unattractive in order to dissuade inmates from opting for protective custody status and to prevent the unit from being perceived as a haven within the institution (PX 11; Wells Tr. 81-83).

129. This Court concludes defendants did not approach the issue of protective custody conditions and programming in good faith or reasonably. It finds defendants' asserted justifications so colored by "overwhelming concentration on asserting 'security' at every stage, whether justified or not," that they are "much less than persuasive in terms of whether those were in fact the motivations that were at work in all of the decisions or, more accurately, in the failure to address the issues" (Closing Tr. 76, 92).

IV. *Injury to Plaintiffs*

130. Defendants' unjustifiable denial of comparable conditions and programming to plaintiffs has harmed and continues to harm plaintiffs. Since 1979 defendants have continuously presented inmates who need protective custody with a Hobson's choice: Either give up most programming and normal prison conditions as the price of obtaining security from the identified threat that led to the request for protective custody, or give up needed protection from that identified threat as the price of retaining access to the full spectrum of programs and conditions. Forcing such a "no win" election causes mental anguish, pain and suffering (Clanon Tr. II 119-22).

131. When an inmate does choose protective custody because of perceived dangers in the general population, many of the conditions he is then compelled to face are also likely to cause harm. Thus the extended periods of isolation and idleness, the humiliation and harassment ex-

perienced in settings such as the library and the sense of having been made a victim by the defendants are all likely to cause at least temporary mental effects. There is even the possibility of an occasional instance in which such effects may be serious enough to become permanent. However remote that possibility, there is no justification for defendants having created it, and there is equally no justification for defendants having created even such temporary effects (Wettstein Tr. II 158-64).

132. In one respect there is a substantially greater likelihood of permanence of the adverse effects. Although it is generally recognized that an institution cannot itself rehabilitate inmates, it does provide a means for inmates to work toward their own rehabilitation. Because protective custody inmates are not given an opportunity to participate in programs that may assist in their rehabilitation, plaintiffs are less likely to rehabilitate themselves and thus are more likely to suffer the psychological effects of continued failure and despair and the more tangible effects of recidivism (Clanon Tr. II 122, 124, 127; DeRobertis Tr. 154-55; Lane Tr. 61-62; O'Leary Tr. 64, 66; Wettstein Tr. II 161). To particularize that result in relation to the preceding Findings, the absence of comparable religious, educational, vocational, employment and recreational opportunities, as well as the lack of any meaningful access to the law library, all create a likelihood of causing mental anguish and long-term effects because of the unavailability of those important factors in an inmate's rehabilitation (Clanon Tr. II 122-24, 127).

133. In purely institutional and practical terms, plaintiffs' inability to participate on a comparable basis in institutional programs also directly affect their chances for parole. As revised in October 1985, the Rules of the Prisoner Review Board (the "Board") provide that the factors primarily looked to by the Board when determining whether to grant or deny parole include "institutional adjustment" and an inmate's "parole plan":

(a) "Institutional adjustment" includes a variety of factors relating to institutional programs, including institutional work assignments, good time credits or loss, completion of high school, college or other academic courses of study, completion of training programs designed to provide vocational skills and success with counseling (PX 82; Longo Tr. 10, 18-19, 21). "Institutional adjustment" is also affected by an inmate's grade status. Factors taken into account in processing requests for grade restorations and security reductions affecting grade status include an inmate's participateion in various programs and services such as jobs, school or vocational training (PX 82; Huff Dep. 23-25).

(b) "Parole plans" provide the Board with a narrative description of what inmates plan to do as to living arrangements, employment opportunities, vocational skills and educational plans after being released. In reviewing a parole plan, the Board considers (1) the relationship between the parole plan and any job assignments, educational programs or vocational training the inmate may have participated in while within the institution and (2) comments from an inmate's clergy, teachers, vocational trainers and job supervisors from within the institution, if the inmate has had contacts with such individuals (PX 82; Longo Tr. 19-20). Obviously the Board cannot consider any of the enumerated factors or give a protective custody inmate credit if he does not have the opportunity to participate or have contact with those factors. Although the Board claims not to penalize a protective custody inmate who does not have program participation factors, because such programs were not available to him, the Board is dependent upon supplemental reports prepared by Department on a case-by-case basis to know which programs are available to protective custody inmates. Unless the institutional report describes program availability for

a protective custody inmate, the Board cannot determine whether the absence of participation carries a negative or a neutral inference (Longo Tr. 15-16, 21).

134. Finally, defendants' failure to provide plaintiffs with comparable job opportunities has caused plaintiffs damage in the form of lost wages. In view of the known unavailability of jobs to protective custody inmates, there was no need for them to have *applied* for jobs to trigger a recovery of such damages. Nor is it feasible to require each individual plaintiff to prove the likelihood he would have applied for and received a particular job. Instead the determination and award of damages can most fairly be done on an average basis through application of the following formula:

Lost pay = (Composite Job Monthly Pay − Monthly Idle Pay) × Months in PC Without Job

Under that formula, "composite job monthly pay" represents the average pay range for jobs held by general population inmates in Cellhouse B, weighted according to their availability, and has been calculated as $19.50 per month. Idle pay is, by regulation, $10 per month (PXs 3-05.03.103A, 86; Wells Tr. 75-80).

*Conclusions of Law*

1. Plaintiffs advance six independent grounds for imposing liability on defendants for their conduct, unquestionably engaged in under color of state law:

(a) Defendants' denial of plaintiffs' free exercise of religion violates their First Amendment rights.

(b) Defendants' denial to plaintiffs of meaningful access to the courts violates their fundamental Fourteenth Amendment due process rights.

(c) Defendants' conduct (1) in conditioning plaintiffs' rights to safety and security on a forfeiture of other rights and privileges and (2) in subjecting plaintiffs to conditions that of themselves are cruel and

unusual, each independently and taken together, violates plaintiffs' Eighth Amendment rights.

(d) Defendants' denial to plaintiffs of comparable opportunities for rehabilitation and parole violates their Fourteenth Amendment rights to due process and equal protection.

(e) Defendants' denial to plaintiffs of housing and programmatic conditions comparable to those offered general population residents violates plaintiffs' Fourteenth Amendment rights to due process and equal protection.

(f) Defendants' denial to plaintiffs (1) of housing and programmatic conditions comparable to those provided to general population residents and (2) of comparable opportunity for rehabilitation and parole each violates Illinois state law.

As the following Conclusions show, all except plaintiffs' Eighth Amendment claims have been sustained.

**Free Exercise of Religion**

2. Since the Trial our Court of Appeals has articulated the relevant free-exercise-of-religion standards in a way that might well have been written for this case, *Caldwell v. Miller*, 790 F.2d 589, 595-96 (7th Cir. 1986) (citations and footnote omitted):

> Lawful incarceration necessarily bring with it the restriction of many privileges and rights. . . . The right to the free exercise of religious beliefs, nevertheless, does not abate upon imprisonment. . . . That right may, of course, be restricted in order to achieve legitimate correctionsl goals, and to maintain institutional security. . . We must, however, carefully scrutinize prison restrictions that affect an inmate's free-exercise rights "to ascertin the extent to which they are necessary to effectuate the legitimate policies and goals of the corrections system." . . . Prison rules

> that restrain the free exercise of religion are justified only if they are "reasonably adapted" to achieving an important penological objective. . . .
>
> We accord, as we must, prision officials wide-ranging deference in adopting policies that are needed to preserve internal order and security, . . . and we will not substitute our judgment for theirs "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." . . . This does not mean, however, that it is appropriate for us to defer completely to prison administrators. . . . By requiring that a prison regulation or policy be reasonably adapted to an important correctional goal, we protect the legitimate interest of prisoners in adhering to their religious beliefs and give guidance to prison administrators in adopting policies that comply with constitutional standards, while at the same time appropriately deferring to their judgment in matters related to institutional security.[8]

3. Communal prayer, religious instruction and private religious counseling are essential parts of the right to the free exercise of religion. Each is central to a meaningful opportunity to practice religious faith. For the reasons demonstrated in the Findings, it must be concluded defendants knowingly and under color of state law unreasonably

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[8] [Footnote by this Court] Though *Caldwell* speaks in terms of religious freedom, its thrust is far more universal. This Court approached the Trial prepared to give defendants the full measure of deference that our Court of Appeals later articulated in the *Caldwell* passage quoted in the text—and to give that deference as to all issues in this case (not only as to religious freedom). These Findings and Conclusions have continued to accord defendants such deference, seeking to avoid any substitution of judgment as to how Stateville should be operated. But by rights defendants really forfeited their right to that deference when their testimony demonstrated a total lack of credibility by attaching the "security" label so indiscriminately and in an unwarranted manner, as detailed in these Findings and Conclusions.

abridged plaintiffs' right to the free exercise of their religion, as defined in *Caldwell*, by failing to provide protective custody inmates with an opportunity to pray communally, by denying them the opportunity to participate in the rituals of their faith and by depriving them of religious counseling and instruction—all in a manner and to an extent "[un]necessary to effectuate the legitimate policies and goals of the corrections system" and not at all " 'reasonably adapted' to achieving [any] important penological objective." Without question defendants "have exaggerated their response to [purported] considerations" of "internal order and security"—they are really post hoc rationalizations for their unconstitutional conduct.

*Meaningful Access to the Courts*

4. Plaintiffs as inmates have a fundamental constitutional right of access to the courts protected by the Fourteenth Amendment. Such access must be adequate, effective and meaningful. That fundamental right requires defendants to provide plaintiffs with meaningful access to adequate law libraries or adequate assistance from persons trained in the law—or perhaps some alternative means to achieve the same goal. *Bounds v. Smith*, 430 U.S. 817, 821-22, 828, 830 (1977); *Corgain v. Miller*, 708 F.2d 1241, 1247-50 (7th Cir. 1983).

5. For the reasons demonstrated in the Findings, it must be concluded defendants knowingly and under color of state law unreasonably deprived plaintiffs of meaningful access to the courts by denying them adequate opportunities to use the library and adequate assistance from persons trained in law. In light of the readily available options, defendants' decisions to restrict protective custody inmates to the library cages, to deny them direct access to even a list of law library books, to force them to request relevant materials in advance and to make them rely on inmate clerks not only (a) deprives them of opportunities equivalent to those afforded to general population inmates, who are permitted personal access to the

prison library, but also (b) violates the constitutional standard of "meaningful access." Here too the claimed security-oriented considerations are a pretext to cover up defendants' unconstitutional conduct.

*Cruel and Unusual Punishment*

6. Under the Eighth Amendment plaintiffs are entitled to be free from cruel and unusual punishment. Inherent in that constitutional guaranty is the right to be free from bodily harm and unreasonable threats to safety and security. Conduct by defendants that reflects a deliberate indifference to that right violates the Eighth Amendment. *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977). Nor may the conditions of confinement themselves be cruel and unusual. *Rhodes v. Chapman*, 452 U.S. 337, 345-47 (1981); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Caldwell*, 790 F.2d at 600-01; *Bono v. Saxbe*, 620 F.2d 609, 612-15 (7th Cir. 1980).

7. Forcing plaintiffs, in order to obtain the protective custody they are entitled to receive, to forego the housing and programming opportunities they should also be entitled to receive—the Hobson's choice identified in Finding 129—poses a "cruel" dilemma for plaintiffs in the rhetorical sense of the word "cruel." But once plaintiffs have opted for protective custody, the conditions of their confinement (though violative of other constitutional rights, as these Conclusions hold) are not "cruel and unusual" as those Eighth Amendment criteria have been defined by the cases, nor is the forced choice itself "cruel and unusual punishment" under the cases.

*Due Process and Equal Protection*

8. Under the Due Process Clause, plaintiffs are protected against arbitrary and unreasonable deprivations of their liberty or property interests without due process of law. Under the Equal Protection Clause, plaintiffs are protected against arbitrary and unreasonable classifications that affect them substantially and adversely. It is unnec-

essary here to determine whether defendants' conduct affects fundamental rights, so as not to be upheld unless defendants can demonstrate a compelling state interest, or whether other lesser interests are at stake, so as to prohibit defendants' conduct only if if fails to bear some rational relationship to a legitimate state purpose. See *Meachum v. Fano*, 427 U.S. 215, 226 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); *Bono*, 620 F.2d at 616-17; *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978); *French v. Heyne*, 547 F.2d 994, 997 (7th Cir. 1976). As the following Conclusions reflect, defendants fail either test.

9. For the reasons demonstrated in the Findings, it must be concluded defendants knowingly and under color of state law arbitrarily and unreasonably violated and continue to violate plaintiffs' rights under both the Due Process and Equal Protection Clauses:

(a) Plaintiffs have constitutionally protected liberty interests, independent of any provision of state law or regulation, in the free exercise of religion, in meaningful access to the courts and in the noninterference on a wholly arbitrary basis with their opportunities for rehabilitation and parole.

(b) Plaintiffs also have constitutionally protected liberty interests created by the mandate of defendants' own earlier version of A.R. 808 that "[h]ousing and programmatic accommodations [for protective custody inmates] shall be comparable to those provided for the general population." Those liberty interests are not diluted by defendants' more recent change in A.R. 808. Because the new regulation was adopted to implement the *Meeks* Decree, it should properly be construed in conjunction with the *Meeks* Decree. Numerous provisions of that Decree have been and continue to be violated, including (1) the guaranty that conditions and programming for a certain class of protective custody inmates will be "the same" as for general population inmates, (2) the pro-

visions affecting all protective custody inmates that educational and vocational programs shall be "equivalent" or equal in value or extent and (2) the requirement that a job plan must be developed (DX 3).

(c) Defendants have not provided plaintiffs with either a predeprivation of a postdeprivation hearing, or with any other process whatever, in connection with the deprivation of plaintiffs's rights—their liberty interests—specified in Conclusions 9(a) and 9(b). On the contrary, no plaintiff in protective custody has any power to escape such deprivations: They are irrevocably tied to protective custody status. Defendants cannot constitutionally condition protective custody status—a status predicated on danger to the safety or even life of an inmate—upon the forced surrender of such liberty interests without any proces of law.

(d) Both under the Equal Protection Clause and under A.R. 808 (see Conclusion 9(b)), plaintiffs are entitled to the opportunity for the free exercise of religion, for meaningful access to legal services and the courts, for prison jobs and for educational and vocational programs on a basis equivalent to that afforded all other inmates, except to the extent of a demonstrated rational relationship between any difference in treatment and a legitimate state interest. Defendants' conduct does not bear any such rational relationship to any legitimate state purpose—instead, their purported justification in terms of security concerns is an arbitrary and exaggerated response and masks defendants' real delinquencies. Their conduct is therefore inconsistent with and violative of equal protection standards as well.

*State Law*

10. A.R. 808 and the *Meeks* Decree have the force of state law. Defendants (a) have knowingly failed to provide plaintiffs with housing conditions and programmatic

accommodations comparable to those they provide to the general inmate population and (b) have not complied with the provisions of the *Meeks* Decree.[9] Accordingly defendants have violated and are violating plaintiffs' rights under state law.

*Remedies*

11. As a class of inmates who have been or will be assigned to protective custody, plaintiffs have been and continue to be proximately harmed by defendants' violations of the Constitution and state law. Because the stated violations of plaintiffs' First and Fourteenth Amendment rights by definition constitute irreparable harm, plaintiffs are entitled to an injunction against defendants' continuing conduct. *Westchester Legal Services, Inc. v. County of Westchester*, 607 F.Supp. 1379, 1385 (S.D. N.Y. 1985); *Lee v. McManus*, 543 F.Supp. 386, 392 (D. Kan. 1982); *Northern Penna. Legal Services, Inc. v. County of Lackawanna*, 513 F.Supp. 678, 685 (M.D. Pa. 1981) (drawing on *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)).

12. Even though defendants have altered their conduct in part to provide some improved conditions and programming for plaintiffs, an injunction is appropriate. Defendants made many of those changes only because of the pressure of this case and the compulsion of the *Meeks* Decree. Moreover, the changes that have been made have not been adequately responsive to all defendants' constitutional violations described in the Findings. Injunctive relief is appropriate both for that reason and because it is necessary to provide assurances that defendants will continue to provide such improved conditions and programming as have been established by their altered conduct.

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[9] Following these Findings and Conclusions, this Court invites the parties' input toward the entry of an implementing Order. One subject the parties should address is the extent (if any) to which the Order should enforce the *Meeks* Decree as such—a decree not assigned to this Court's calendar.

13. Plaintiffs have also established the predicate for an award of compensatory damages. Although no award may be made for defendants' denials of plaintiffs' constitutional rights as such (*Memphis Community School District v. Stachura*, 106 S.Ct. 2537, 2544-45 (1986)), they are entitled to damages for injuries that can be measured in monetary terms: (a) pain, suffering and mental anguish already suffered and proximately caused by defendants' unlawful actions; (b) pain, suffering and mental anguish reasonably certain to be suffered in the future from the same causes; and (c) back pay (see Finding 134) for lost wages from defendants' failure to provide plaintiffs with opportunities to have jobs or participate in educational or vocational programs, as well as for the impairment of their earning capabilities (*Memphis*, 106 S.Ct. at 2542-43).

14. Defendants are entitled to qualified immunity from such damage recovery only if their conduct did not violate statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986) ("The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful"). Immunity does not extend to the violation of plaintiffs' rights committed by defendants here. Decisions predating the plaintiff class commencement date of April 30, 1982 had clearly established plaintiffs' constitutional rights, in the context of the prison environment, to the free exercise of religion (*Cruz v. Beto*, 405 U.S. 319, 322 & n.2 (1972) (per curiam)), meaningful access to legal services (*Bounds*, 430 U.S. at 821-22, 828; *Procunier v. Martinez*, 416 U.S. 396, 419 (1974)), due process (*Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974)) and equal protection (*Lee v. Washington*, 390 U.S. 333 (1968) (per curiam); *French*, 547 F.2d at 996-97). And there is nothing unique about the nature of the rights asserted by plaintiffs that would render the *Harlow-Azeez* principles inapplicable.

15. In addition to actual damages, the law permits an award of punitive and exemplary damages to punish egre-

gious violations of constitutional rights and to serve as a warning to others not to engage in such conduct. Such damages are recoverable "if the defendant's conduct involves reckless or callous indifference to the plaintiff's rights, or if the action is motivated by evil intent." *Perry v. Larson*, 794 F.2d 279, 286 (7th Cir. 1976), citing *Smith v. Wade*, 461 U.S. 30, 56 (1983). Because neither plaintiffs' nor defendants' counsel have focused fully on just which defendants are and which are not liable for such damages and on the amount of such liability, final entry of such award will await further submissions by the parties.

16. As prevailing parties, plaintiffs are entitled to their costs, including reasonable attorneys' fees, under 42 U.S.C. §1988.

* * *

Counsel for plaintiffs have submitted, as part of their proposed Findings and Conclusions, a proposed form of Order. Because counsel for defendants understandably had not acknowledged liability in their own submission, they had not commented directly on the proper form of an order to that effect. Accordingly on or before November 3, 1986 they are directed to do so (with particular reference to the form of Order previously submitted by plaintiffs' counsel), and both sets of counsel are also directed to address the subject referred to in Conclusion 15.

/s/ Milton I. Shadur
United States District Judge

Date: October 21, 1986

# APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHEN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| SHANGO, (Cleve Heidelberg, Jr.), et al., Plaintiffs, v. MARY JURICH, et al., Defendants. | Consolidated Cases No. 74 C 3598, 76 C 3068, 76 C 3379, 77 C 103 |
| JAMES L. SIMS, Plaintiff, v. MARY JURICH, et al., Defendants. | Related Case No. 75 C 3388 |
| STEVE NICHOLS, et al., Plaintiffs, v. MARY JURICH, et al., Defendants. | Related Case No. 76 C 3600 |

MEMORANDUM OPINION AND ORDER

* * * * *

C. Conclusions of Law

The Law Library

The plaintiffs' main claim is that the defendants have deprived the class members of their right of access to the courts in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[15] The plaintiffs also contend that the defendants has also breached the Consent Decree.

The seminal case on the right of access is *Bounds v. Smith*, 430 U.S. 817 (1977). In *Bounds*, the Supreme Court stated that "it is now established beyond doubt that prisoners have a constitutional right of access to the courts" and that the states have "affirmative obligations" to assure such access.[16] *Bounds v. Smith*, 430 U.S. 817, 821-24 (1977). To satisfy their constitutional obligation, states must adopt remedial measures to ensure that the right of access to the courts is "adequate, effective and meaningful." *Id.* at 822. Moreover, the states bear the burden of demonstrating the adequacy of the means they have chosen. *Caldwell v. Miller*, 790 F.2d 589, 606 (7th Cir. 1986); *Campbell v. Miller*, 787 F.2d 217, 226 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 673 (1986). In *Bounds*, the Supreme Court specifically extended the constitutional right of access to the courts by requiring states to assist inmates in the preparation and filing of meaningful legal papers including habeas-corpus petitions and filings related to civil-rights actions. *Bounds*, 430 U.S. at 828 n.17. *Bounds* did not mandate that any one form of assistance be made available; regardless of whether a prison has a law library, trained legal assistance, a combination or

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[15] In addition to the fourteenth amendment, courts have referred to the first amendment and the privilege and immunities clause as sources of the right of access to the courts. *See Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983), *cert. denied*, 461 U.S. 960 (1983).

[16] *Bounds* was the culmination of a long series of Supreme Court decisions which addressed various aspects of the right of access question. *See Bounds*, 430 U.S. at 822-25 (cases cited therein).

some other form of assistance, the inquiry is whether as a whole the system satisfies constitutional standards. *Id.* at 830-32; *Gometz v. Henman*, 807 F.2d 113, 116 (7th Cir. 1986).

Stateville has no established program for providing inmates with trained legal assistance.[17] Consequently, this court's focus mostly will be on the adequacy and availability of the law library; the court will, however, consider the legal-clerk program when the court determines whether Stateville's plan, evaluated as a whole, is sufficient to ensure that all inmates have meaningful access to the courts as required by *Bounds*.

If the issue is the adequacy of a law library alone, the Supreme Court in *Bounds* suggested that an inmate should have sufficient resources at his disposal to allow him to research such issues as jurisdiction, venue, standing, exhaustion of remedies, and the types of relief available. *Bounds*, 430 U.S. at 825. More importantly, an inmate should be able to research "what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action." *Ibid. Accord Campbell*, 787 F.2d at 226 n.15.

Based on Findings Nos. 1-5, the court concludes that the legal collection at Stateville satisfies the requirements of *Bounds* and its progeny. The diverse legal collection of statutes, reporters, and practice guides are more than ample to provide the inmates with the tools necessary to research the law and determine what facts are necessary to support a cause of action. Having satisfied the consti-

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[17] Alone, Stateville's training program for resident legal clerks would not satisfy the *Bounds* test. Indeed, *Bounds* stated that for such a program alone to be sufficient the inmate clerks would have to receive paralegal training *and* be under a lawyer's supervision. *Bounds*, 430 U.S. at 831. *Accord Walters v. Thompson*, 615 F. Supp. 330, 340 (N.D. Ill. 1985) (Moran, J.). Although the inmates at Stateville receive some degree of legal training, they do not act under the supervision of an attorney.

tutional threshold, Stateville has another hurdle to overcome. Stateville assumed an additional obligation under the terms of the Consent Decree, which, in relevant part, provides:

> A. *Facilities*
>
> (1) * * *
>
> (2) [Bur Oak] will maintain the legal collection in the law library at least at its present level of quality and at a level that conforms to the standards set by the American Correctional Association/American Library Association. Defendants will file with the court an inventory of the legal reporters and other material in the library collection as of November 1, 1980. All legal reporters will be updated on a periodic basis. Volumes that are destroyed or defaced will be replaced by Bur Oak.

Although the court found that Stateville discontinued several legal publications, the court concludes that this does not amount to a violation of the Consent Decree. In support of this conclusion, the court notes that the AALL standards do not require a prison law library to stock bankruptcy materials, law journals, or such other material discontinued by Stateville. Rather the AALL standards focus only on those legal materials that are essential for inmates to challenge the conditions of their confinement and pursue post-conviction remedies. The law library presently contains those materials. *See* DX 20. The court further concludes that the Consent Decree has not been violated simply because some volumes from the legal collection are presently missing and others are defaced. Given Stateville's good faith efforts to assure the availability of legal materials through adequate, alternative channels, *see* Finding No. 4, Stateville has been able to maintain the quality of its legal collection at an acceptable level within the terms of the Consent Decree.[18]

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[18] Although Stateville has adopted several alternative means by which inmates can obtain legal materials, it is clear that the steal-

(Footnote continued on following page)

Because of the adequacy of the library, if the inmates are granted adequate access to the law library they, in turn, are considered to have adequate access to the courts. *See Hossman v. Spradlin*, 812 F.2d 1019, 1021 (7th Cir. 1987). The Seventh Circuit has interpreted the *Bounds* guarantee of "meaningful" access as requiring prisoners to receive that "quantum of access to prison libraries—not total or unlimited access—which will enable them to research the law and determine what facts may be necessary to state a cause of action." *Hossman*, 812 F.2d at 1021 (citing *Campbell*, 787 F.2d at 226 n.15). In determining what quantum of access is constitutionally adequate, this court must weigh the extent to which the inmates' right of access is burdened by a particular prison regulation or practice against the legitimate security and administrative interests of the state prison officials. *Procunier v. Martinez*, 416 U.S. 396, 420 (1977); *Campbell*, 787 F.2d at 226. The court must give appropriate deference to the expertise and discretionary authority of the correctional officials to operate the penal institution when the court performs the balancing of interests. *Procunier v. Martinez*, 416 U.S. at 420. Prison officials need to regulate the time, manner, and place in which library facilities are used. *Hossman*, 812 F.2d at 1021 n.1. Consequently, "where 'meaningful' access to the courts is not denied as the result of inconvenience or even highly restrictive regulations governing the use of a prison law library, no constitutional guarantee to court access is violated." *Hossman*, 812 F.2d at 1021 (footnote omitted). Prison officials may not, however, simply parrot assertions of "discipline and security" to support overly restrictive policies which

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[18] *continued*

ing and defacing of the current collection is a problem that must eventually be dealt with in order to prevent future litigation. To help lessen this problem, Stateville could purchase book detectors of the type currently used in most public and university libraries to prevent the theft of materials. Likewise, closer inspection of the inmates materials taken from the law library might reveal stolen cases or other legal materials.

unduly infringe upon the prisoners' fundamental rights. *Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985). In short, this court's "deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute." *Campbell*, 787 F.2d at 227, n.17.

Specifically elaborating on the foregoing, the Seventh Circuit requires the prisoner to show actual harm or prejudice arising from the prison's restrictive policies in order for his claim to survive. *Howland v. Kilquist*, 833 F.2d 639, 642-43 (7th Cir. 1987). As the Seventh Circuit specifically stated in *Hossman v. Spradlin*, 812 F.2d 1019, 1021-22 n.2 (7th Cir. 1987):

> . . . in order to proceed to trial and survive a motion for summary judgment, a plaintiff should be required, no matter how minimally, to allege some quantum of detriment caused by the challenged conduct of state officials resulting in the interruption and/or delay of plaintiff's pending or contemplated litigation.

*Accord Howland*, 833 F.2d at 642-643 (citing *Hossman*); *Campbell v. Miller*, 787 F.2d at 229.

The court's discussion of the inmates' access to the law library begins with the general-inmate population. Current regulations indicate that inmates in a particular cellhouse are scheduled to use the law library for approximately 10½ hours on one designated weekday. The plaintiffs concede that the schedule is constitutionally adequate if followed, but argue that various circumstances, such as unscheduled library closings, late formations of the celllines, meal conflicts, and denial of library requests have not allowed them to utilize their scheduled library time. The plaintiffs submit that it is these circumstances which represent constitutional denials of their right to access to the courts. This argument suggests that inmates have a right to some minimum amount of time in the law library.

But so long as the plaintiffs have "meaningful access" as defined by *Bounds*, they are not entitled to a specific number of hours in the law library. In fact in *Bounds* the Court found that a full day's work in the library (in-

cluding transportation to and from the library) every three or four weeks satisfied the standard for meaningful access. *Bounds*, 430 U.S. at 819, 832-33. *See also Campbell*, 787 F.2d at 227 (7th Cir. 1986) (eight-day delay did not infringe right of access). Only if the class members demonstrate that they have somehow been prejudiced by not being able to utilize the library under the existing practices do they establish violation.[19]

Based on the court's findings and the record as a whole, there is no evidence to suggest that inmates in the general population have been actually prejudiced by Stateville's existing practices and regulations. The mere fact that some inmates may suffer delays and other inconveniences in obtaining access to the law library due to late formations of the call lines, the late serving of meals, or even the occasional refusal to honor library call requests does not amount to a constitutional violation requiring relief on a class-wide scale. *See Hossman*, 812 F.2d at 1021 (inmate's claim that he was prevented from gaining access to the law library on six separate occasions failed to establish infringement of right of access). Accordingly, the court concludes that Stateville's access plan for inmates in the general population is constitutionally sufficient.

The issue of inmates confined to the respective segregation and protective-custody units presents a more difficult question. These inmates, unlike those in the general population, are not given the direct access to the law library which would allow them the opportunity to browse the stacks. Rather, these inmates may only use the limited quantity of study cells located within the library facility

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[19] Of course, if the state failed to provide inmates with either a library or assistance from persons trained in the law as required by *Bounds*, then there would be no need to demonstrate actual harm or prejudice since such harm would be presumed. *See Walters*, 615 F. Supp. at 338. Such a situation does not exist here since Stateville does provide a law library and resident legal-clerks.

and must obtain access to the legal collection through the conduit of the resident legal-clerks. The question is whether this study-cell arrangement satisfies the constitutional mandate of meaningful access to the courts for the special-custody inmates.

At the outset, this court notes that inmates confined to the segregation unit at Stateville are there because they pose a threat to other inmates and the orderly operation of the prison. Because of the security status of these prisoners, the state is justified in adopting reasonable policies that restrict their direct access to legal materials. In *Campbell v. Miller*, 787 F.2d 217 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 673 (1983), inmates confined to a segregation unit did not have direct access to the prison's main library. To obtain legal materials, the inmates had to request the books by giving an exact cite to inmate clerks who, in turn, retrieved the materials for them. Moreover, the inmates could only have two volumes in their cells for a twenty-four hour period. The inmates based their requests on citations from basic reference materials available in the cellhouse. Notwithstanding these inconveniences and the delays associated with the exact-cite system, the Seventh Circuit held that the system did not infringe the inmates' right of access to the courts since the restrictions implicated legitimate security and disciplinary concens. *Campbell*, 787 F.2d at 227-28.

Similarly, in *Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986), inmates confined to the segregation unit were not permitted direct access to the main law library. Rather, they were restricted to the "basic library" which contained rudimentary reference materials. Based on the use of these reference materials, inmates could then request legal materials from the main library by giving exact cites to inmate clerks who in turn retrieved the materials. In upholding this system, the court stated:

> Restrictions on direct access to legal materials may be justified in light of legitimate security considerations. As we noted at the outset, Marion presents

> unique disciplinary and security considerations. . . . Because we find that the direct-access restrictions do not render Caldwell's access to the courts, as a general matter, unmeaningful, and that these restrictions are supported by legitimate security considerations, we will defer to the judgment of Marion officials in adopting the procedures they have.

*Caldwell*, 790 F.2d at 606 (citations omitted).

Based on the foregoing the court concludes that the system of study cells is constitutionally permissible for high risk inmates so long as there is some provision whereby those inmates may obtain the legal materials they require. The court further concludes that the study-cell arrangement at Stateville is adequate for a number of reasons. First, the study cells are located in the library itself just several feet from the legal collection. *See* DX 6B, 6C. Accordingly, inmates immediately obtain legal materials by simply requesting it from one of several resident legal-clerks working at the law library. Second, inmates using the study cells are provided research assistance from the legal clerks. Although these clerks are by no means skilled attorneys, they do possess sufficient skills to provide the inmates with the proper sources from which to begin their research. By using these initial sources, such as digests, annotated statutes, and encylopedias, inmates can easily follow-up their research during the same library session by simply requesting additional materials from the legal clerks. Finally, although the segregated inmates complain that this reliance on the legal clerks results in delays and inconveniences, the court finds nothing in the record which conclusively demonstrates that Stateville's plan pertaining to the use of the study cells has caused actual prejudice to an inmate's ability to file or pursue legal actions. Since the Stateville plan is less restrictive than the plans sanctioned by the Seventh Circuit in *Campbell* and *Caldwell*, the court defers to the expertise and judgment of the Stateville officials.

Judge Moran's decision in *Walters v. Thompson*, 615 F. Supp. 330 (N.D. Ill. 1985) is distinguishable. In that case, a class action was brought on behalf of all inmates confined to the segregation units of the Illinois maximum security institutions, including Stateville. The plaintiff class sought a mandatory injunction requiring the Department of Corrections to establish comprehensive training programs for inmate clerks together with lawyers independent from the institution to supervise those clerks. Although the action was on behalf of all inmates confined to Illinois segregation units, the case was based on a record involving only the Menard and Joliet Correctional Centers.

In addressing the practices at Menard, Judge Moran found that the use of study-cells located within the library provided segregation inmates with a form of access to the law library. *Walters*, 615 F. Supp. at 337. He, however. further concluded that the inmates' access to the library was insignificant since library visits for segregated inmates averaged only one hour in length and were very infrequent (approximately six visits per year). *Ibid.* Moreover, no group of legal clerks, inmate or otherwise, existed to assist segregated inmates. *Id.* at 337. Based on those findings, Judge Moran concluded that segregation inmates at Menard demonstrated a likelihood of success on their claim. *Id.* at 538-40.

As for Joliet, Judge Moran found that the inmates were not permitted direct access to the prison law library.[20] Instead, inmate clerks visited the segregation unit no more than three times a week (frequently less), inter-

[20] The record showed the library at Joliet had specially designed facilities which gave inmates access to case reporters and other legal materials while still isolating them from contact with the regular inmates. *Walters*, 615 F. Supp. at 336. This arrangement is somewhat similar to that of Stateville. Joliet, however, began to dismantle these facilities, but subsequently stopped by agreement until a hearing could be held on the scope of injunctive relief. *Id.* at 336 n.4.

viewed the inmates, reviewed legal documents and took requests for legal materials. The clerks then conducted research for the inmates and delivered the materials during the next scheduled session. *Id.* at 336. Judge Moran concluded that the research efforts of these segregated inmates was hindered by their sole reliance on ill-trained inmate clerks for advice and assistance, by the extremely cumbersome nature of the runner system, and by the limited amount of materials they could obtain from the library due to photocopy limits. *Id.* at 339. Accordingly, he concluded that the inmates' had a reasonable likelihood of success on their claim that the Joliet plan was unconstitutional. *Id.* at 340. Judge Moran, however, refused to issue the requested injunction since the record, based only on the practices at Menard and Joliet, was too incomplete for the court to determine with assurance that segregated prisoners in *all* maximum security institutions were being denied meaningful access to the courts. *Id.* at 342.

The practices at Menard and Joliet are different from those in Stateville in important respects. Unlike Menard, segregated inmates at Stateville are scheduled to use the law library for approximately three hours each weekday morning. Because the study cells are located in the library itself, the inmates do not suffer the inconvenience and delays associated with the cumbersome runner system at Joliet. In addition to obtaining direct access to the law library through the use of study cells, segregated inmates at Stateville are also visited every week in their cellhouse by trained legal clerks.

In addressing the adequacy of Stateville's plan as it pertains to the protective custody inmates, this court is mindful of Judge Shadur's decision in the case of *Williams v. Lane*, 646 F. Supp. 1379 (N.D. Ill. 1986), a case litigated simultaneously with this action. In *Williams*, Judge Shadur found that Stateville had "unreasonably deprived the [protective custody inmates] of meaningful access to the courts by denying them adequate opportunities to use the library and adequate assistance from persons trained in the law." *Id.*, 646 F. Supp. at 1407. In support of this conclusion,

Judge Shadur stated that Stateville had used the claim of security as a pretext to restrict protective-custody inmates to the study cells, had forced the inmates to request relevant materials in advance, and had required them to rely on inmate clerks. According to Judge Shadur, this, in effect, both deprived the protective-custody inmates of opportunities equivalent to those afforded to the general-population inmates and violated the constitutional standard of meaningful access. *Ibid.*

An examination of the *Williams* decision reveals that this case is markedly different from the one presented before Judge Shadur. In *Williams*, protective-custody inmates were challenging the denial of services and programs equivalent to those afforded to the general population inmates. Such programs and services included religious services, library programs, vocational and educational programs, and job opportunities. *Williams v. Lane*, 646 F. Supp. 1379, 1406 (N.D. Ill. 1986). Here the issue is simply whether all inmates at Stateville, including protective-custody inmates, are provided with meaningful access to the courts. In this regard, this court does not have to determine the constitutionality of the conditions of confinement of the inmates in protective custody, but instead needs to focus only on the adequacy of Stateville's plan of court access.

Based on the record presented, this court concludes that Stateville's plan, evaluated as a whole, provides protective-custody inmates with meaningful access to the courts. Most significantly, there is no evidence showing that the use of the study-cells has substantially impaired the protective-custody inmates' ability to obtain access to the courts. The mere fact that these inmates must wait their turn to use the study-cells does not amount to a constitutional deprivation. *See Hossman*, 812 F.2d at 1021 n.1. Even though several plaintiffs testified that they were unable to gain access to the law library on any particular day, no evidence was offered to show that that inability resulted in an adverse legal judgment.

The constitutionality of the plan for the inmates confined to the orientation unit and hospital remains. Stateville has no existing plan for providing regular library access to those two categories of inmates. The absence of any established access plan, however, does not give the plaintiffs an automatic victory. For indeed, the duration of these inmates' confinement is considerably less than that of inmates in the general prison population or to special custody. At Stateville the inmates in the orientation units are confined there for a maximum of two weeks. Upon release, the library facilities become available to them in a manner which depends upon whether they are put in the general population cellhouses or the special-custody cellhouses. Inmates confined to the hospital are also there on a temporary basis (barring any major medical complications) and may fully utilize the prison library upon their release. Given the short period of confinement, the court concludes that these inmates suffer no danger of losing valid claims because of Stateville's policy with respect to them. *Cf. Morrow v. Harinell*, 768 F.2d 619, 624 (5th Cir. 1985) (there is no easy test to apply when determining how lengthy a stay has to be before the right of access is triggered). In addition, inmates confined to either the orientation unit or the hospital are not totally isolated from the library or the courts. Inmates in the orientation unit who can verify a litigation deadline are permitted to visit the library for a short period of time on a day allotted for them. Moreover, inmates in both the orientation unit and the hospitals are visited periodically by resident legal-clerks who provide them with legal forms and other assistance. Since again there is no evidence demonstrating actual harm resulting from Stateville's policies, this court concludes that there has been no constitutional violation.

In summary, the court concludes there is no evidence that any inmate at Stateville has not been provided with meaningful access to the courts as defined in *Bounds* and its progeny. The absence of any proof of harm or prejudice to the inmates demonstrates the reasonableness of

Stateville's policies and regulations. The inmates' testimony pertaining to delays and inconveniences in obtaining access to the law library or to its legal collection is insufficient to overcome the legitimate security concerns of the institution.

Although Stateville is under no constitutional obligation to provide trained legal assistants, it voluntarily assumed such an obligation under the Consent Decree. Based on this court's findings, the court concludes that the defendants have satisfied their obligations under the Consent Decree of providing inmates with a sufficient number of adequately trained legal-clerks to assist the inmates with their legal needs.

This court's findings demonstrate that inmates can seek further assistance from jailhouse lawyers. Any constitutional right to receive assistance from other prisoners is necessarily conditioned upon a showing that no adequate alternative means of access to the courts is available without the help of a jailhouse lawyer. *Kunzelman v. Thompson*, 799 F.2d 1172, 1179 (7th Cir. 1986); *Buise v. Hudkins*, 584 F.2d 223, 228 (7th Cir. 1978). Since this opinion makes clear that inmates at Stateville have been provided with meaningful access to the courts through an adequate law library and access plan, the plaintiffs have not carried their burden of establishing an additional right to assistance from jailhouse lawyers.[21]

The plaintiffs claim that Stateville is required to permit co-plaintiffs in civil suits or co-defendants in criminal appeals to meet with one another or with their witnesses

[21] This conclusion is in no way meant to endorse further restrictions on the ability of inmates to obtain assistance from jailhouse lawyers. Indeed, the record in this case demonstrates that jailhouse lawyers contribute greatly to reducing the work-load imposed on the resident legal-clerks and thereby furthers the success of Stateville's access plan. Accordingly, this court encourages the use of jailhouse lawyers even though, based on this record, it is not constitutionally mandated.

in prison to discuss litigation strategy. The plaintiffs have not cited any authority, nor has the court found any, which stands for the proposition that inmates have a constitutional right to meet with their co-litigants while in prison. An inmate does not have the right to be confined in any one prison. *See Olim v. Wakinekona*, 461 U.S. 238, 244 (1983). If an inmate can be transferred to a different prison at any time, any where, it follows that there is no right to be confined with any particular inmate, including co-litigants.

* * * * *

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-899

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,**

*Petitioners,*

vs.

**WILLIE WILLIAMS, on behalf of himself and all others similarly situated,**

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF THE STATES OF INDIANA AND KANSAS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the Court of Appeals misapprehended the legitimate security concerns of prison administrators already recognized by this Court.

II. Whether the Equal Protection Clause mandates that protective custody inmates be provided with programs and services that are fully equal to those provided for general population inmates.

III. Whether the Court of Appeals misapplied this Court's standard for review of prison policies.

IV. Whether the Court of Appeals misapplied this Court's standard with regard to the defense of qualified immunity.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| INTEREST OF AMICI CURIAE | 1 |
| STATEMENT OF THE CASE | 4 |
| ARGUMENT | 5 |
| I. | |
| THE COURT OF APPEALS MISAPPREHENDED THE LEGITIMATE SECURITY CONCERNS OF PRISON ADMINISTRATORS ALREADY RECOGNIZED BY THIS COURT | 5 |
| II. | |
| THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT INMATES IN PROTECTIVE CUSTODY RECEIVE PROGRAMS AND SERVICES THAT ARE FULLY EQUAL TO THOSE AFFORDED TO GENERAL POPULATION INMATES | 9 |
| III. | |
| THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD FOR REVIEW ENUNCIATED IN *TURNER* AND *O'LONE* | 12 |
| IV. | |
| THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD FOR APPLICATION OF QUALIFIED IMMUNITY | 14 |
| CONCLUSION | 18 |
| APPENDIX A—Excerpts from the Special Master's Proposed Remedial Plan, filed with the United States District Court for the Northern District of Illinois, Eastern Division, December 20, 1988 | A-1 |

## TABLE OF AUTHORITIES


| *Cases* | PAGE(S) |
|---|---|
| *Allgood v. Morris*, 724 F.2d 1098 (4th Cir. 1984) | 9, 10, 11, 16 |
| *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034 (1987) | 14 |
| *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979) | 5, 7 |
| *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 (1977) | 16, 17 |
| *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1491 (1972) | 16, 17 |
| *Doe v. District of Columbia*, 701 F.2d 948 (D.C. Cir. 1983) | 6 |
| *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972) | 9 |
| *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 107 S.Ct. 77 (1986) | 9, 10, 11, 16 |
| *French v. Owens*, 538 F.Supp. 910 (S.D. Ind. 1982) | 16 |
| *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) | 14, 15, 16 |
| *Harris v. Fleming*, 839 F.2d 1232 (7th Cir. 1988) | 9 |
| *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671 (1980) | 9 |
| *Hewitt v. Helms*, 495 U.S. 460, 103 S.Ct. 864 (1983) | 6, 7 |
| *Jones v. North Carolina Prisoner Labor Union*, 433 U.S. 119, 97 S.Ct. 2532 (1977) | 7 |

*Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981) . 10, 13, 16

*Marchesani v. McCune*, 531 F.2d 459 (10th Cir. 1976) ..... 5

*Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) ..... 14, 15

*Murphy v. United States*, 653 F.2d 637 (D.C. Cir. 1981) ..... 5

*O'Lone v. Estate of Shabazz*, ___ U.S. ___, 107 S.Ct. 2400 (1987) ..... 12, 13, 14

*Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800 (1974) ..... 7

*Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800 (1974) ..... 7

*Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1987) .. 9

*Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986) . 10, 12, 16

*Turner v. Safely*, ___ U.S. ___, 107 S.Ct. 2254 (1987) ..... 12, 13, 14

*Williams v. Lane, et al.*, 851 F.2d 867 (7th Cir. 1988) ..... 2, 10

*Williams v. Lane, et al.*, 646 F.Supp. 1379 (N.D. Ill. 1986) ..... 2, 10

*Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974) ..... 6

*Statute*

42 U.S.C. § 1983 ..... 14

No. 88-899

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OCTOBER TERM, 1988

MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,

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vs.

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## BRIEF OF THE STATES OF INDIANA AND KANSAS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

## INTEREST OF AMICI CURIAE

The Amici Curiae States of Indiana and Kansas submit this brief in support of the Petitioners', officials of the Illinois Department of Corrections, petition for review on writ of certiorari of the decision rendered by the United States

Court of Appeals for the Seventh Circuit in *Williams v. Lane, et al.*, 851 F.2d 867 (7th Cir. 1988) (a copy of the opinion is contained in Petitioners' Appendix). The Court of Appeals affirmed a District Court opinion that protective custody inmates at the Stateville Correctional Center, one of Illinois' four maximum security prisons, were entitled to the same programs and services as those provided to general population inmates. *See, Williams v. Lane, et al.*, 646 F. Supp. 1379 (N.D. Ill. 1986) (a copy of the opinion is contained in Petitioners' Appendix).

In its opinion, the District Court concluded that the Illinois correctional officials' restrictions on certain services and their failure to provide protective custody inmates with programs and services equal to general population constituted, *inter alia*, a violation of the inmates' First Amendment rights to freedom of religion and their Fourteenth Amendment rights to access to the courts and equal protection. Additionally, the District Court, citing cases concerning generalized inmate rights to freedom of religion and access to the courts, stripped the prison officials of qualified immunity despite prior rulings by the Seventh and Fourth Circuits that equal programming for protective custody inmates was not required.

The creation of a right of protective custody inmates to have programs and services equal to those provided to general population inmates, and the denial of qualified immunity for officials who do not provide such equal programs and services, will adversely impact the operation of Amici's prisons. The Amici states currently operate maximum security prisons which to some degree restrict the programs and services to protective custody inmates compared to those provided to general population inmates. In neither of the Amici states are protective custody in-

mates afforded all programs and services provided to general population inmates. In operating their protective custody units, Amici's prison administrators have, wherever possible, attempted to isolate protective custody inmates not only from the general population but also from each other in order to address the unique security needs which these inmates present.

For example, in the Amicus State of Indiana, the inmates housed in the protective custody units of the state's prisons are offered more restricted programs than are offered to the general population inmates. While the programs and services afforded protective custody inmates vary from institution to institution, in no institution are protective custody inmates permitted direct access to the law library; in institutions where educational services are offered to protective custody inmates, they are offered in cell, not communally; and protective custody work assignments are very limited. While some institutions in Indiana permit weekly communal religious services and communal dining, in other institutions such services are not offered to protective custody inmates. If the Court of Appeals' decision in this case is permitted to stand, correctional officials may be required to redesign their protective custody policies and units at substantial cost and risk to security.

The decision of the Court of Appeals holding unconstitutional policies which are highly similar to Amici's prison administrators' policies for addressing the security needs of protective custody inmates raises significant legal questions concerning the operations of protective custody units in Amici's facilities. The Seventh Circuit's ruling cuts directly to the heart of the most fundamental area of penological interest, namely safety and security. If admin-

istrators in the Amici states are required to provide communal activity to protective custody inmates similar to that provided to general population, security will be jeopardized and operating costs will be drastically increased. Protective custody inmates are often a threat to one another; the threat is not only from general population inmates. Moreover, the Seventh Circuit's ruling on qualified immunity could result in administrators being exposed to thousands of individual liability actions, with a potential cost of enormous magnitude.

In light of the serious impact the Court of Appeals' decision has on the fundamental penological interest and the operation of Amici's prison systems, the Petitioners' petition for review on writ of certiorari should be granted by this Court.

## STATEMENT OF THE CASE

Amici rely on the statement as set forth in the petition of the Defendants-Petitioners.

## ARGUMENT

### I.

### THE COURT OF APPEALS MISAPPREHENDED THE LEGITIMATE SECURITY CONCERNS OF PRISON ADMINISTRATORS ALREADY RECOGNIZED BY THIS COURT.

In deferring to certain factual findings of the District Court in this case, the Court of Appeals has misapprehended the legitimate security concerns of prison administrators already recognized by this Court. There is no question that even based on the factual findings of the District Court, the protective custody unit at Stateville is not violative of the United States Constitution. Courts have previously noted the unique safety and security concerns which prisoners assigned to protective custody present; the danger which would arise if these inmates are not isolated from general population inmates; and the legitimate operational concerns these inmates present to prison administrators. Refusal by the District Court and Court of Appeals to recognize these concerns could imperil the lives of prisoners and correctional staff in prisons throughout the nation.

This Court has long recognized the intractable problems in managing a modern correctional facility. *Bell v. Wolfish*, 441 U.S. 520, 548, 99 S.Ct. 1861, 1867 (1979). The violent nature of the American prison population is also well recognized. *See, Murphy v. United States*, 653 F.2d 637, 642 (7th Cir. 1981) ("[v]iolence is unfortunately endemic to American prisons"); and *Marchesani v. McCune*, 531 F.2d 459, 462 (10th Cir. 1976), *cert. denied*, 429 U.S. 846, 97 S.Ct. 127 (1976) ("[p]rison setting is at best tense. It is sometimes explosive and always potentially dangerous.").

This Court has also noted the dangerous nature of American prisons, characterizing them as:

> . . . a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life.

*Wolff v. McDonnell*, 418 U.S. 539, 561-562, 94 S.Ct. 2963, 2977 (1974). Stateville, as one of Illinois' four maximum security prisons, is no exception to this rule. In fact it is undisputed that the inmates at Stateville are among Illinois' most dangerous offenders.

The violent criminals incarcerated at a prison such as Stateville pose not only a danger to the public, but to each other as well. As this Court noted in *Hewitt v. Helms*, 459 U.S. 460, 474, 103 S.Ct. 864, 872 (1983):

> [i]n the violatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disasterous incidents.

*See also, Doe v. District of Columbia*, 701 F.2d 948, 951 (D.C. Cir. 1983) ("[t]he existence of some violence in prisons is unavoidable, given the character of prisoners society must place behind bars.").

The fact that dangerous inmates congregating together may constitute a significant threat to institutional security has been recognized by this Court:

> It is clearly not irrational to conclude that . . . concerted group activity, or solicitation therefore, would pose additional and unwarranted problems and frictions in the operation of the State's penal institutions. The ban on inmate solicitation and group meetings, therefore, was rationally related to the reasonable, indeed to the central, objectives of prison administration.

*Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 2539 (1977).

The District Court's order compelling increases in communal activities, including dining, recreation, education, religious services and library access, requires implementation of practices which have already been recognized by this Court as disregarding basic security concerns. The opinion serves to minimize the importance of security, a position which is clearly at odds with prior decisions of this Court.

> The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration. *See Bell v. Wolfish, supra,* 441 U.S. at 547, 99 S.Ct. at 1878; *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 132, 97 S.Ct. 2532, 2541, 53 L.Ed. 2d 629 (1977); *Pell v. Procunier,* 417 U.S. 817, 823, 94 S.Ct. 2800, 2804, 41 L.Ed. 2d 495 (1974); *Procunier v. Martinez,* 416 U.S. 396, 404, 94 S.Ct. 1800, 1807, 40 L.Ed. 2d 224 (1974).

*Hewitt,* 459 U.S. at 473, 103 S.Ct. at 872.

In the present case, the danger of providing programs and services, while ignored by the District Court, was readily apparent to the Special Master appointed by the District Court. In the Introduction to the Special Master's Proposed Remedial Plan (excerpts of the Proposed Remedial Plan are attached as Appendix A [App. A]) which was filed with the District Court on December 20, 1988, the

Special Master made the following observation on the impact of his Proposed Remedial Plan:

> As the plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another. Hence, failures of equal protection in one protective custody regime, as at present, risk being supplanted by failures sufficiently to protect the inmates one from another. The balance is neither obvious nor easy to strike.

App. A-4. The Special Master's Proposed Remedial Plan acknowledges the dangers attendant on providing programs and services to protective custody inmates which have been well recognized by this Court and which were ignored by the District Court and the Court of Appeals. Moreover, these conclusions by the Special Master directly contradict the District Court's finding that the Petitioners had no legitimate security interests in restricting programs.

The failure of the District Court to recognize Petitioners' security interest in limiting the congregation of maximum security protective custody prisoners for their own safety, and the Court of Appeals' affirmation of that decision, is contrary to the law established by this Court. As this ruling misapprehends the legitimate security interests of prison administrators which have been repeatedly recognized by this Court, the Seventh Circuit decision should be reversed.

## II.

## THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT INMATES IN PROTECTIVE CUSTODY RECEIVE PROGRAMS AND SERVICES THAT ARE FULLY EQUAL TO THOSE AFFORDED TO GENERAL POPULATION INMATES.

The equal protection clause does not deny a State the power to treat different classes of persons in different ways. *Eisenstadt v. Baird*, 405 U.S. 438, 446-47, 92 S.Ct. 1029, 1035 (1972). If the group to which plaintiffs belong is not similarly situated to the group receiving the benefits to which they claim entitlement, the equal protection clause cannot be implicated. The differences in the circumstances of protective custody and general population inmates and the special needs of protective custody inmates have been uniformly recognized by Courts. *Harris v. Fleming*, 839 F.2d 1232, 1236 (7th Cir. 1988); *French v. Owens*, 777 F.2d 1250, 1256 (7th Cir. 1985); *Allgood v. Morris*, 724 F.2d 1098, 1100-01 (4th Cir. 1984). It is uncontested that inmates confined in protective custody have demonstrated a special desire and need to be protected from other inmates for their own welfare, and that general population and protective custody inmates must be separated to a significant extent. Therefore, providing different programs and services to these inmates does not implicate the equal protection clause.

Moreover, it is well settled that the guarantee of equal protection is not the source of substantive rights or liberties. *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691 (1980); *see also, Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982). The Constitution does not guarantee protective custody inmates equal privileges to those afforded to general population inmates. Indeed, Judge Flaum in his concurring opinion in this case notes that the deci-

sion may well impose upon Petitioners "the burden of affording to protective custody inmates *rights which are not necessarily indicated by recent Supreme Court precedent.*" [Emphasis added]. *Williams*, 851 F.2d at 886. Creation of such new rights is impermissible.

However, even assuming that the equal protection clause were implicated, it is undeniable that there exists a rational relationship between restricting the access of protective custody inmates to communal programs and services and the legitimate security concerns relating to those inmates. The District Court found that protective custody inmates fight among themselves and may face a general undefined threat from other protective custody inmates. *Williams*, 646 F.Supp. at 1395. Providing access to comparable programs and services communally, as the District Court requires, necessarily will expose protective custody inmates to other inmates in protective custody or in general population and increase the risk of assault upon those inmates. Not only does the decision of the Court of Appeals in the instant case not credit this principle, it conflicts with other decisions within the Seventh Circuit as well as the Fourth Circuit. *See, French, supra*; *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981); *Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986); and *Allgood, supra.*

In *French*, the Seventh Circuit, quoting the Fourth Circuit's decision in *Allgood*, reversed a District Court ruling that security concerns of the prison officials were insufficient to limit access of protective custody inmates to the same programs and services as general population inmates. The Seventh Circuit noted:

> Protective segregation is offered to inmates for their safety, the safety of others in confinement, and to insure institutional security and order. To allow prisoners in protective custody to enjoy all of the same

> privileges to the same degree as those in the general population would eviscerate the nature of protective segregation. Because the difference in treatment among prisoners and the general population has a substantial, rational basis in the legitimate state interest of prison security, we hold that . . . rights to equal protection have not been abridged.

777 F.2d at 1256 (quoting *Allgood v. Morris*, 724 F.2d 1098, 1100-1101 (4th Cir. 1984)).

The Seventh Circuit's decision in this case is inconsistent with *French*. In reliance on the *French* decision, the Amicus State of Indiana has continued to provide limited programs and services to inmates in protective custody at the Indiana Reformatory, the institution which was the subject of the suit in *French*, as well as at its other prisons. It is the position of the Amici States that in accordance with *French*, restrictions on the programs for inmates in protective custody do not violate the equal protection clause.

In *Taylor*, the Fourth Circuit upheld more restrictive conditions imposed on protective custody inmates than those present at Stateville. The conditions which the Fourth Circuit found not to be violative of equal protection included the following:

> . . . there is no law library. There is no telephone in the cell block in which prisoners in protective custody are lodged. The exercise yard for the segregation facility is not as commodious as that for the general population. Overall, the limited availability of staff and the need to protect prisoners in protective custody limits or prohibits organized recreational activities, organized drug counseling, vocational training and other rehabilitative classes, the availability of organized religious services, visitation rights and the availability of gain time or incentive wage jobs.

781 F.2d at 1049.

The Fourth Circuit concluded in *Taylor*:

> . . . that conditions imposed on prisoners requesting protective custody less favorable than those afforded the general prison population do not give rise to a meritorious claim of denial of equal protection or a denial of due process where restrictions bear a rational relationship to the protection of the prisoner requesting such relief and where the restrictions are not so onerous as to jeopardize his health.

781 F.2d at 1050.

The conclusion of the Court of Appeals based on the facts in *Taylor* cannot be reconciled with the conclusions of the Court of Appeals based on the facts in this case, especially in light of this Court's recognition in *Jones* of the obvious danger created when inmates congregate. *See*, Section I of this Argument. The application of the equal protection clause to the disparity in programs and services between protective custody and general population inmates without recognition of the obvious security problems attendant on providing protective custody inmates a safe environment is a clear misapplication of the equal protection clause.

## III.

## THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD OF REVIEW ENUNCIATED IN *TURNER* AND *O'LONE*.

In its decision, the Court of Appeals' panel recognized that the standard to determine the constitutionality of the restrictions at issue is the test articulated by this Court in *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987), and *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S.Ct. 2400 (1987). However, the panel's decision did not properly apply the *Turner-O'Lone* standard when it held that

the restrictions imposed on programming for protective custody inmates at Stateville were unconstitutional.

In the *Turner* and *O'Lone* cases, this Court identified four factors that must be weighed in judging the constitutionality of a prison regulation. This test and the decisions reached by this Court in *Turner* and *O'Lone* cannot be reconciled with the conclusion of the Court of Appeals in the instant case which found no logical connection between restricting the programming of protective custody inmates and the unique security needs of those inmates. Regardless of any credibility findings made by the District Court, the Court of Appeals' conclusion is clearly erroneous in light of this Court's analysis concerning the inherent dangers in congregating convicted felons in a maximum security prison and the primacy of security and safety as a penological objective. There is obviously a logical relationship between the restriction of protective custody inmate movements and the maintenance of their safety and security. *Accord*, *Lock v. Jenkins*, 641 F.2d 488, 497 (7th Cir. 1981) ("[p]risoners selecting placement in the [protective custody] Unit, generally to avoid perceived dangers to themselves, also logically must be subject to significant restrictions."). This logical relationship between inmate safety and restrictions on programming is even recognized by the District Court's own Special Master. App. A-4.

The Court of Appeals' decision also fails to apply the other *Turner-O'Lone* factors in a manner consistent with this Court's direction. In its opinion, the panel dismissed the fact that protective custody inmates at Stateville had been afforded alternative means to exercise their restricted rights, particularly in the areas of religion and law library services. Similarly disregarded was the staggering financial burden that the District Court's order would impose on the State of Illinois.

By misapplying of the *Turner-O'Lone* standards, ignoring the logical connection between restriction on the activities of protective custody inmates and their physical safety and security, failing to recognize the provision of alternative access to programs and services and disregarding the obvious financial consequences of the District Court's order, the Court of Appeals has set an extraordinarily dangerous precedent. If Amici are faced with similar litigation based on the ruling in this case, the consequences could well be the degradation of security practices nationwide and the imposition of mammoth expenses on already overburdened prision systems.

## IV.

## THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD FOR APPLICATION OF QUALIFIED IMMUNITY.

The social costs in the form of financial and operational burdens that liability suits brought under 42 U.S.C. Section 1983 impose on state officials are well recognized by this Court. *See, Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034 (1987). As a way of balancing the burden on government officials against the interests of citizens to preserve their civil rights, this Court ruled in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982), that government officials generally are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985), this Court stated that when reviewing a denial of a claim of qualified immunity a court must decide only a question of law; namely, "whether the legal norms allegedly violated by the defendant were *clearly established* at the time of the chal-

lenged actions." (emphasis supplied) 472 U.S. at 528, 105 S.Ct. at 2816. The standard for making that determination is an objective one. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

This case illustrates the need for qualified immunity. The class consists of all inmates who have been assigned to protective custody at any time since April 30, 1982, or who will be assigned there in the future. *Williams*, 646 F. Supp. at 1381. The District Court found that the protective custody population at Stateville averaged about two hundred, while noting that at the time of trial there were between two hundred and sixty and three hundred inmates. Assuming that the class, for purposes of damages, included all inmates housed in the unit from April 30, 1982 to the present, plaintiffs would be entitled to damages for over a six and one-half year period. Calculated at the District Court's modest average of two hundred inmates for a six and one-half year period, at one dollar a day, a judgment would subject the Petitioners to damages in the amount of $474,500. At ten dollars a day damages total $4,745,000. In addition, prison officials would be required to expend substantial sums defending against hundreds of individual damage claims. Pursuant to the stipulation noted in the District Court's opinion, this number exceeded five hundred inmates at the time of trial in February 1986. In light of the number of persons incarcerated and thus affected by policies and practices in prisons throughout the country, qualified immunity protects prison officials from enormous judgments. The defense of qualified immunity should only be denied where the law is clearly established. It was not when this suit arose.

Prior to the Court of Appeals' decision in this case, panels of both the Fourth and Seventh Circuits addressed the specific issue of the right of protective custody in-

mates to programs and services equal to those provided to inmates in general population. The panels concluded that the actions of prison administrators in denying such equal access were constitutional. *See*, *French*, *supra*; *Lock*, *supra*; *Allgood*, *supra* and *Taylor*, *supra*. In *French*, a case in which rehearing was denied by the Seventh Circuit after the conclusion of the trial in this case, the Seventh Circuit stated, "This circuit has previously held that security reasons justify limiting the access of prisoners in protective custody." 777 F.2d at 1256. It is clear that the rights at issue in this case were not clearly established at the time of trial.

The District Court in *Williams* found Defendants' practice of bringing protective custody inmates to study carrels, rather than permitting them to browse in the law library, violated their right to access to the courts. Even assuming this to be correct, it cannot be said to constitute a clearly established right as the Seventh Circuit in *French* reversed the District Court's finding and held that the failure to permit inmates on self lock up to go to the library was not a constitutional violation. *See*, *French v. Owens*, 538 F.Supp. 910, 920 (S.D. Ind. 1982).

The Court of Appeals in this case, however, ignored those decisions and instead relied on cases such as *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1941 (1977), and *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079 (1972) in determining that the petitioners were in violation of clearly established law. *Bounds* and *Cruz*, however, are seminal decisions which articulated the general rights to access to courts and freedom of religion for prison inmates. These decisions do not specify how these rights are to be provided to protective custody inmates, and in no way established a clear legal norm as required under *Harlow* concerning the issues presented in this case. Under the reasoning of the

District and Circuit Courts, any determination that an inmate's right of access to the courts or freedom of religion has been violated could result in rejection of the qualified immunity defense, since the generalized rights have been established in *Bounds* and *Cruz*. This restrictive application of the defense of qualified immunity is contrary to this Court's prior decisions and defeats the underlying public policy.

If the Court of Appeals' misapplication of qualified immunity is permitted to stand, the requirement of showing clearly established law will become a nullity. Prison administrators will act at their peril, for the mere existence of a generally recognized constitutional right will strip them of their qualified immunity, regardless of the specific situations and circumstances which present themselves to the administrators during the day to day operations of their prisons. The result of the Seventh Circuit's interpretation of qualified immunity may be to expose the correctional administrators of Amici to thousands of lawsuits based only on generalized theories of constitutional liability.

## CONCLUSION

For the foregoing reasons, the Amici Curiae States of Indiana and Kansas request that this Court grant Petitioners' petition for review on writ of certiorari.

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December 27, 1988

# APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

MICHAEL LANE, et al.,

Defendants.

---

No. 81 C 0355—Judge Milton I. Shadur, Presiding

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# PROPOSED REMEDIAL PLAN

December 20, 1988
submitted by
Norval Morris, Special Master

## INTRODUCTION

This proposed remedial plan provides for a dramatically different protection custody regime than that now enforced at Stateville. Lest it be thought the product of an academic's specious imaginings, let me stress that in its broad contours, its shape and most of its details, it closely tracks recommendations made by representatives of the Department of Corrections at a week-end meeting (a "retreat") convened for this purpose in mid-November. At that meeting, Mr. Mahoney and I, assisted by Mr. Norman Carlson, and Mr. John Rees, were the recipients of the Department's suggestions, and found ourselves not only in agreement with their broad thrust and most of their details,

but also impressed by the care and generosity of spirit with which they had been prepared. There were, of course, sticking points and points of conflict, but they concerned matters of detail and scope, not issues of the general direction to be followed.

I have not isolated what were and what were not Departmental recommendations. The meeting at which the pattern of this proposal was settled was intended to be one of free exchange, advisory rather than in any way binding; but it is nevertheless proper for me to stress that the theme of this remedial plan is essentially a product of the work of members of the Department of Corrections—to whom I am grateful.

Many of the problems of this protracted litigation have their origin, [sic] (in my view, and in that of the consultants who have assisted me, and members of the staff of the Department of Corrections in their unguarded moments, in what I have come to think of as the hydraulic effect of protective custody.

It is a problem common to many large prisons in this country. If the large maximum-security prisons prove to be largely ungovernable, heavily influenced by gang behavior, places of pervading fear for the weak and the isolate, protective custody gains in attraction to many prisoners. This is particularly true when protective custody provides both relative safety and single celling. Further, it is extremely difficult to test the reality of fears for their safety expressed by prisoners as a reason for seeking protective custody (many prisoners gave to me, as their reasons for being in protective custody, reasons which were inconsistent with the defined purposes of that classification and different from what they had earlier claimed in order to gain admission to protective custody).

There thus emerges a serious problem of "gate keeping" if the prison authorities are not to be faced with the task of running two prisons in every large maximum-security prison. And there thus further emerges a strong temptation to make the conditions in protective custody substan-

tially less congenial, setting aside personal harassment and safety, than those allowed by general population of the prison. This temptation is abetted by the understandable desire, enforced by threat of civil suit, to make conditions in protective custody extremely safe—which is another way of saying lacking in the usual prison programs, since each increment of program adds an increment of risk of injury.

Recognizing these genuine difficulties, I had at first been encouraged by the authorities at Stateville, by counsel to the Department of Corrections and counsel to the plaintiffs, to include in the commentary to this proposed remedial plan some ideas that might help to mitigate this problem. At the "retreat" I was advised that, for reasons relating to other cases confronting the Department, they did not wish me to deal at any length with this problem—merely to note its obvious existence, as I now have. Since the terms of reference of my appointment do not include this issue, I shall take the matter no further unless requested to do so by the Court.

A further important issue was also withdrawn from discussion by the Department at the "retreat." I will merely mention what it was and avoid exegesis. Norman Carlson, John Rees, Michael Mahoney and I are all of the view that double celling in protective custody, at least to the same proportional extent that it exists in the general population, though undesirable, is not inappropriate given population pressures, and that it can be done without serious threat to security. The Department's position is that double celling does not fall within my terms of reference and they requested that I should not expand on the topic, though prior to the "retreat" I was being encouraged to deal with it.

As a final introductory comment let me add this: A prison in complete lock-down, while it is in lock-down, is a safe prison. Protective custody now at Stateville—which is not in lock-down but is very tightly controlled, with limited inmate interaction, and with rarely any substantial number of prisoners out of their cells at any one

time—is a relatively safe form of imprisonment, as indicated by the low indeces of assaults there as compared to the general population. As the plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another. Hence, failures of equal protection in one protective custody regime, as at present, risk being supplanted by failures sufficiently to protect the inmates one from another. The balance is neither obvious nor easy to strike. It is my view that the balance struck in the following proposed remedial plan avoids any failure of equal protection and yet provides for the establishment of constitutionally safe protective custody regimes at Stateville.

The proposal is arranged under the following headings:

Full and Limited Programs
Religion
Library (Law and General)
Education
Jobs and Pay
Food
Recreation
Cell Time and Association
Monitoring

Under each heading there is a proposal and a commentary. Where appropriate a cost estimate is included at the end of each commentary. The proposals are collected into a Proposed Remedial Order appended to this document.

Mr. Mahoney has authorised me to state that he is in express and detailed agreement with me in the proposed remedial plan and that he also agrees with the general tenor of the commentary.

Many have helped Mr. Mahoney and me in this task, but we both wish to express our particular gratitude to Mr. Leo Meyer, Warden O'Leary, Mr. Norman Carlson, Mr. John Rees, and Ms. Judy Cottle.

* * * * *

Supreme Court, U.S.
FILED
DEC 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-899

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL P. LANE, et al.,
*Petitioners,*

vs.

WILLIE WILLIAMS, et al.,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## RESPONDENTS' BRIEF IN OPPOSITION

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Dated: December 28, 1988

**Counsel of Record*

## STATEMENT REQUIRED BY RULE 28.1

The full name of the party represented is Willie Williams, an inmate under the custody and control of the Illinois Department of Corrections, and the class consists of all inmates who have been assigned to the protective custody unit at the Stateville Correctional Center at any time since April 30, 1982. Neither Williams nor any class member is a corporation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Brief in Opposition | 1 |
| Counterstatement of the Case | 2 |
| Reasons for Denying the Writ | 3 |
| 1. The Courts Below Committed No Error of Fact or Law | 3 |
| 2. The Courts Below Correctly Rejected Petitioners' Claim to Qualified Immunity | 5 |
| 3. Petitioners' Post-Trial Conduct Fully Justified Appointment of the Special Master | 6 |
| Conclusion | 7 |

## TABLE OF AUTHORITIES


Anderson v. City of Bessemer City, 470 U.S. 564 (1985) ..... 3, 4

French v. Owens, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 77 (1986) ..... 5

O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987) ..... 2, 5

Taylor v. Rogers, 781 F.2d 1047 (4th Cir. 1986)... 5

Turner v. Safley, 107 S. Ct. 2254 (1987)..... 2, 4, 5

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## RESPONDENTS' BRIEF IN OPPOSITION

The Petition for Writ of Certiorari seeks review of a decision of the Seventh Circuit Court of Appeals that affirmed the findings of fact, conclusions of law and final injunctive order of the district court acting as trier-of-fact in a prisoners' rights case against state prison administrators. Properly characterized, the decisions below present no issue worthy of Supreme Court review. The courts below applied the long-established "reasonable relationship" standard to the particular facts before them in concluding that petitioners' conduct unlawfully impinged respondents' constitutional rights. The decisions below thus depart from no legal precedent, threaten no prison official who can rationally justify restrictive actions and blaze no trails.

## COUNTERSTATEMENT OF THE CASE

This case is a prisoners' class action for injunctive relief and damages under 42 U.S.C. § 1983 for violation of constitutional rights. (App. A-5) Respondents are a class of inmates assigned to protective custody at Stateville Correctional Center ("Stateville"), an Illinois maximum security prison. (App. A-5) Petitioners are administrators of Stateville sued in their individual capacities for acts taken under color of state law. (App. A-5)

Respondents brought this action to challenge petitioners' restriction of their constitutional rights to free exercise of religion, meaningful access to the courts, due process and equal protection by failing and refusing to provide respondents with programming and living conditions comparable to those provided to Stateville's general population inmates. (App. A-6) The merits of the complaint were tested in a ten-day bench trial that produced 18 witnesses, 1,970 pages of testimony, 86 documentary exhibits, and a comprehensive 82-page opinion by the trial judge. The opinion, which is published at 646 F. Supp. 1379 and reproduced in Appendix D to the Petition, contains 134 detailed findings of fact and extensive conclusions of law. It recounts the bases for the trial court's judgment that petitioners' conduct bore no reasonable relationship to legitimate penological interests and, hence, violated respondents' constitutional rights.

The panel of the Seventh Circuit Court of Appeals unanimously affirmed the trial court's decision in a studied 32-page opinion (including a two-page concurrence), which is published at 851 F.2d 867 and reproduced in Appendix D to the Petition. The panel "examined in detail" the "extensive record in this case" and concluded that the trial court had committed no clear error of fact and had correctly applied the law. (App. A-3) The panel affirmed because, "in contrast to *O'Lone* [*v. Estate of Shabazz*, 107 S. Ct. 2400 (1987)] and *Turner* [*v. Safley*, 107 S. Ct. 2254 (1987)], the [petitioners] failed to establish a record which revealed the manner in which security considerations were seri-

ously implicated by the unequal treatment afforded to protective custody status inmates." (App. A-5)

The panel also affirmed the trial court's denial of qualified immunity for petitioners, stressing that the trial court had relied on "landmark Supreme Court cases" that "clearly established that prison officials must demonstrate at a minimum a rational basis" for abridging prisoners' rights. (App. A-25) The panel affirmed the trial court's decision to appoint a special master because "the record here is replete with instances of administrative recalcitrance" and "non-compliance with the previous district court order was emphasized." (App. A-28)

The full Seventh Circuit denied petitioners' rehearing petition, with suggestion for rehearing *en banc*, with not one of the active circuit judges requesting a vote thereon. (App. B-2) The Seventh Circuit also denied petitioners' motion to stay the mandate, characterizing it as "another delaying tactic" which raised "meritless" issues. (Order of September 14, 1988)

With issuance of the mandate, the district court appointed Norval Morris, Professor of Law and Criminology and former Dean of the University of Chicago Law School, to serve as special master to oversee the development and implementation of a remedial plan. (Order of September 23, 1988) On December 20, 1988, Professor Morris submitted a proposed remedial plan which provides a blueprint for remedying the unconstitutional conditions within 3 months and at marginal expense. (Special Master's Proposed Remedial Plan of December 20, 1988)

## REASONS FOR DENYING THE WRIT

### 1. The Courts Below Committed No Error of Fact or Law.

In *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985), this Court instructed that the scope of appellate review of trial court fact findings is limited:

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals

> may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

The Court admonished that, "when findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Id.* at 575.

Review of this case is controlled by the teachings of *Anderson*, as the court of appeals acknowledged. (App. A-3 to -4) Here, the trial judge scrutinized petitioners' security explanations for their restriction of respondents' constitutional rights and found as fact that they were "exaggerated, at times arbitrary and in several instances wholly pretextual." (App. D-48 (FF 127)) The trial judge further found as fact that petitioners "did not approach the issue of protective custody conditions and programming in good faith or reasonably." (App. D-49 (FF 129)) These findings were based both on substantial record evidence and on the credibility and demeanor of the witnesses. (App. D-48 (FF 127-28))

The panel of the Seventh Circuit reviewed these and the trial court's other findings "on the entire record," *Anderson*, 470 U.S. at 573, and concluded that "[t]he district court quite properly refused to accept [petitioners'] testimony because it conflicted with the objective factual record." (App. A-5) The panel rejected as "unpersuasive arguments" (App. A-4) the same kind of selective rendition of the evidence that is offered in the Petition. (*Compare, e.g.*, App. A-7 (protective custody "neither 'voluntary' nor 'temporary'") *with* Petition at 10-11.)

The panel applied to the trial court's findings the well-settled legal standard, most recently articulated by this Court in *Turner v. Safley*, 107 S. Ct. at 2261, that restriction of inmates' constitutional rights is valid only "if it is reasonably related to

legitimate penological interests." (App. A-13) There is thus nothing to reconcile between the panel's decision and that in *Turner* and *O'Lone*, nor is there any conflict between the panel's decision and that in *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 77 (1986), or *Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986), as claimed by the Petition. As the panel recognized (App. A-23), the results in these cases may differ, not because different legal standards were applied, but because different factual situations were found.

Finally, neither the panel nor the trial court held that the Constitution mandates "fully equal" programs and services for respondents, a contention that is the centerpiece of the Petition. They held simply and properly that petitioners' willful failure and refusal to provide respondents' comparable programming and housing conditions without a rational basis constituted unlawful abridgement of respondents' constitutional rights. The holdings below provide no basis for Supreme Court review.

**2. The Courts Below Correctly Rejected Petitioners' Claim to Qualified Immunity.**

Petitioners' failure to obtain qualified immunity was correctly premised by the courts below on the fact that their conduct was found to have lacked a reasonable relationship to legitimate penological interests. (App. A-25.) The Petition does not contest the fundamental fact that the case law at the time petitioners acted was crystal clear that prison officials must show a reasonable relationship to legitimate penological interests to justify restriction of inmate constitutional rights. There is no issue of qualified immunity in this case worthy of Supreme Court review.

**3. Petitioners' Post-Trial Conduct Fully Justified Appointment of the Special Master.**

The appointment of the special master in this case does not implicate the deference ordinarily due prison adminstrators, as

claimed in the Petition. It vindicates judicial authority to remedy unconstitutional conditions where prison administrators stubbornly resist. For nearly a year, petitioners met each of the district court's post-trial orders for good faith proposals for a remedial plan with the persistent theme that no remedy is feasible or possible. (App. A-12, -27 to -28; C-2) As the panel's concurrence explained, "[petitioners] and their counsel forced the district judge's hand." (App. A-32)

The argument that petitioners have not failed to comply "with an order of the district court to remedy any specific condition at Stateville" (Petition at 18) is particularly disingenuous. The argument seeks to preclude use of a special master to assist the district court in developing a specific remedial plan, on the ground that petitioners have yet to violate such a plan, the entry of which has been forestalled by petitioners' obdurate conduct.

## CONCLUSION

In this case, the trial judge weighed the evidence and the credibility of the witnesses and concluded that petitioners' conduct bore no reasonable relationship to legitimate penological interests. The court of appeals affirmed because it found no clear error in the trial judge's findings and no legal error in the trial judge's conclusions. Both courts properly applied the controlling legal precedent to the particular facts before them. There is no issue worthy of review by this Court, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

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*Petitioners,*

vs.

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY BRIEF OF PETITIONERS

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Printed by Authority of the State of Illinois (P.O. 34338—55—1-9-89)

## QUESTIONS PRESENTED

In addition to the questions presented in their Petition for Writ of Certiorari, Petitioners submit the following:

I. Whether the Special Master's Proposed Remedial Plan establishes a rational relationship between security and protective custody programs and services.

## LIST OF PARTIES

The Petitioners were previously identified in their Petition for Writ of Certiorari.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 3 |
| I. THE SPECIAL MASTER'S PROPOSED REMEDIAL PLAN ESTABLISHES A RATIONAL RELATIONSHIP BETWEEN SECURITY AND PROTECTIVE CUSTODY PROGRAMS AND SERVICES | 3 |
| CONCLUSION | 8 |
| APPENDIX A—Excerpts from the Special Master's Proposed Remedial Plan, filed with the United States District Court for the Northern District of Illinois, Eastern Division, December 20, 1988 | A-1 |

# TABLE OF AUTHORITIES


| *Cases* | PAGE |
|---|---|
| *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504 (1985) ..... | 6, 7 |
| *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939 (1979) .. | 7 |

In The

# Supreme Court of the United States

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**MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,**

*Petitioners,*

vs.

**WILLIE WILLIAMS, on behalf of himself and all others similarly situated,**

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY BRIEF OF PETITIONERS

Petitioners, Michael Lane, Michael O'Leary and Richard DeRobertis, respectfully submit this reply in further support of their prayer that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 27, 1988.

## OPINIONS BELOW

Petitioners rely on the statement of opinions below set forth in their Petition for Writ of Certiorari.

## JURISDICTION

Petitioners rely on the statement of jurisdiction set forth in their Petition for Writ of Certiorari.

## STATUTE INVOLVED

Petitioners rely on the statement of statute involved set forth in their Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Petitioners rely on the statement of the case set forth in their Petition for Writ of Certiorari. In response to Respondents' counterstatement of the case in their Brief in Opposition, Petitioners note that the Proposed Remedial Plan which Respondents cite had not been submitted at the time of the filing of the Petition for Writ of Certiorari. Excerpts of the Special Master's Proposed Remedial Plan, filed with the United States District Court for the Northern District of Illinois, Eastern Division on December 20, 1988, are attached as Appendix A (App. A-1). Petitioners address the Proposed Remedial Plan, raised by Respondents' Brief in Opposition, in the Argument offered below.

## REASONS FOR GRANTING THE WRIT

In addition to those arguments set forth in their Petition for Writ of Certiorari, Petitioners respond to the argument raised in the Brief in Opposition and supplement their prior arguments stating as follows:

## ARGUMENT

### I.

### THE SPECIAL MASTER'S PROPOSED REMEDIAL PLAN ESTABLISHES A RATIONAL RELATIONSHIP BETWEEN SECURITY AND PROTECTIVE CUSTODY PROGRAMS AND SERVICES.

As Respondents point out in their Brief in Opposition, the District Court's opinion in this case and the Court of Appeals' affirmance of that opinion are predicated on the finding that there is no rational relationship between Petitioners' security concerns and the restrictions placed on the programs and services provided to protective custody inmates. Petitioners submit, however, that this finding is inconsistent with the Proposed Remedial Plan submitted by the Special Master[1] cited by the Respondents in their brief. *See*, App. A1-4. The plan actually documents the existence of the relationship between protective custody programming and security. In the introduction to the

[1] The Special Master, as noted in the Brief in Opposition, is Professor Norval Morris, former Dean of the University of Chicago Law School.

plan, the Special Master notes the relative safety of the protective custody unit at Stateville. Recognizing the "genuine difficulties" in operating a protective custody unit in an institution like Stateville, the Special Master further stated: "As the [Proposed Remedial] plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another". *See*, App. (A-4)

Thus, the Special Master's plan acknowledged the logical connection between Petitioners' security concerns and restricted programming which was ignored by the District Court. The plan was fashioned after the Special Master, his Monitor and experts on prison administration retained by the Special Master, made several extensive visits to Stateville.[2] During these visits, the Special Master, his Monitor, and his experts interviewed staff and inmates and were afforded unlimited access to and reviewed documents; all pursuant to the District Court's Order of Reference which afforded them unrestricted access to Stateville.

Furthermore, Petitioners submit that the Special Master's opinions in the plan mirror the convincing evidence found throughout the record that the heightened security concerns presented by protective custody inmates provided prison administrators a rational, logical basis for placing

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[2] The Monitor Mr. Morris selected was Mr. Michael Mahoney, Executive Director of the John Howard Association. The experts retained by the Special Master were Mr. Norman Carlson, former Director of the United States Bureau of Prisons and John Rees, Administrator of the Santa Fe County Detention Center, Santa Fe, New Mexico. Both experts have extensive corrections experience.

restrictions on programs and services offered to those inmates. For example, at trial Assistant Deputy Director DeRobertis, Warden O'Leary, Superintendent Wheaton and the Corrections Commissioner of Kentucky Al Parke, an expert witness, testified that restrictions on the out-of-cell movement of protective custody inmates and limitations on the numbers of protective custody inmates moved were the basic means used to protect protective custody inmates from general population inmates, as well as from other protective custody inmates. Vol. 7A, 29-30; Vol. 10B, 122, 125; Vol. 8B, 128-129; Vol. 10A, 49. Moving large groups of protective custody inmates to program areas increases the risk of attack because contact with general population inmates from whom these inmates are seeking protection is increased and supervision of mass line movements is more difficult. Vol. 7A, 36; Vol. 10B, 125. Supervision is made even more difficult due to blind spots on the route to program areas, including the library, educational building, vocational school and gymnasium (Vol. 8B, 148-150) and due to the complex scheduling of activities for all inmates throughout the 64-acre institution. Vol. 7A, 48, 50-51.

The Special Master's Proposed Remedial Plan also recognizes what experience has taught Petitioners: first, that the current operation of protective custody is relatively safe, thereby meeting the inmates' security concerns; and second, that increasing programs and services for inmates in protective custody will necessarily downgrade that security. At trial, Petitioners established that different methods of providing programs to protective custody were attempted over time but proved unsuccessful. When the Petitioners tried to move a relatively large number (50-60) of protective custody inmates at one time, to go to the yard, numerous assaults occurred. Vol. 8B, 128-129. Com-

plaints were received from protective custody inmates that they were being intimidated by general population inmates when they were permitted to go to the kitchen to obtain food. Vol. 8B, 147. When routine protective custody showering schedules were not followed because of protective custody work assignments, a protective custody inmate was murdered in 1984 by two other protective custody inmates. Vol. 8B, 127-138. When protective custody inmates were permitted to eat on the flag instead of in their cells, a sanitation problem was created. Vol. 10B, 134.

The District Court, in ordering increased communal activities including dining, recreation, education, religious services and library access, ignored basic security concerns which were established at trial and acknowledged by the District Court's own Special Master. The District Court's opinion cannot be reconciled with the opinion of its own Special Master. Because the Special Master's Proposed Remedial Plan establishes that there is a rational basis between security and restrictions on protective custody inmates' access to programs and services, the decision of the Court of Appeals should be reversed.

Respondents argue that this case is controlled by the opinion in *Anderson v. City of Bessemer City N.C.*, 470 U.S. 564, 105 S.Ct. 1504 (1985) and that a district court's findings of fact may not be overturned unless "clearly erroneous". This "clearly erroneous" standard was defined by this court in *Anderson*.

> Although the meaning of the phrase 'clearly erroneous' is not immediately apparent certain general principles governing the exercise of the appellate court's power to overturn findings of the District Court may be derived from our cases. The foremost of these principles . . . is that *'[a] finding is clearly*

> *erroneous, when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* [Citation Omitted] [Emphasis Added] 470 U.S. at 573

Petitioners submit that an examination of *all* the facts in the record show that there is a logical relationship between safety and security of the protective custody inmates at Stateville and the existing restrictions on programming at Stateville. As this Court has noted in *Vance v. Bradley*, 440 U.S. 93, 110-112, 99 S.Ct. 939, 949-50 (1979), in order for there to be a finding of no rational relationship consistent with constitutional requirements, there must be a finding of no logical connection between the means chosen and the ends sought to be achieved. The admission that a relationship between means and ends exists should immunize the policy in question from constitutional challenge. 440 U.S. at 112, 99 S.Ct. at 950. The Special Master's plan clearly establishes the existence of such a relationship. *See*, App. A-4.

Furthermore, while Respondents' Brief in Opposition suggests that the opinion below blazes no new trails, a decision which places in the hands of a district court, and not prison officials, the delicate balance between inmates' security (in a protective custody unit designed to ensure their safety) and inmate programming is, in fact, new law. The Court of Appeals' opinion mandates "constitutional relief" that has never been required by any decision of this Court or any other court and, therefore, merits further review by this Court.

## CONCLUSION

For the foregoing reasons, the petitioners respectfully request this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

MICHAEL LANE, et al.,

Defendants.

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No. 81 C 0355—Judge Milton I. Shadur, Presiding

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# PROPOSED REMEDIAL PLAN

December 20, 1988
submitted by
Norval Morris, Special Master

## INTRODUCTION

This proposed remedial plan provides for a dramatically different protection custody regime than that now enforced at Stateville. Lest it be thought the product of an academic's specious imaginings, let me stress that in its broad contours, its shape and most of its details, it closely tracks recommendations made by representatives of the Department of Corrections at a week-end meeting (a "retreat") convened for this purpose in mid-November. At that meeting, Mr. Mahoney and I, assisted by Mr. Norman Carlson, and Mr. John Rees, were the recipients of the Department's suggestions, and found ourselves not only in agreement with their broad thrust and most of their details,

but also impressed by the care and generosity of spirit with which they had been prepared. There were, of course, sticking points and points of conflict, but they concerned matters of detail and scope, not issues of the general direction to be followed.

I have not isolated what were and what were not Departmental recommendations. The meeting at which the pattern of this proposal was settled was intended to be one of free exchange, advisory rather than in any way binding; but it is nevertheless proper for me to stress that the theme of this remedial plan is essentially a product of the work of members of the Department of Corrections—to whom I am grateful.

Many of the problems of this protracted litigation have their origin, [sic] (in my view, and in that of the consultants who have assisted me, and members of the staff of the Department of Corrections in their unguarded moments, in what I have come to think of as the hydraulic effect of protective custody.

It is a problem common to many large prisons in this country. If the large maximum-security prisons prove to be largely ungovernable, heavily influenced by gang behavior, places of pervading fear for the weak and the isolate, protective custody gains in attraction to many prisoners. This is particularly true when protective custody provides both relative safety and single celling. Further, it is extremely difficult to test the reality of fears for their safety expressed by prisoners as a reason for seeking protective custody (many prisoners gave to me, as their reasons for being in protective custody, reasons which were inconsistent with the defined purposes of that classification and different from what they had earlier claimed in order to gain admission to protective custody).

There thus emerges a serious problem of "gate keeping" if the prison authorities are not to be faced with the task of running two prisons in every large maximum-security prison. And there thus further emerges a strong temptation to make the conditions in protective custody substan-

tially less congenial, setting aside personal harassment and safety, than those allowed by general population of the prison. This temptation is abetted by the understandable desire, enforced by threat of civil suit, to make conditions in protective custody extremely safe—which is another way of saying lacking in the usual prison programs, since each increment of program adds an increment of risk of injury.

Recognizing these genuine difficulties, I had at first been encouraged by the authorities at Stateville, by counsel to the Department of Corrections and counsel to the plaintiffs, to include in the commentary to this proposed remedial plan some ideas that might help to mitigate this problem. At the "retreat" I was advised that, for reasons relating to other cases confronting the Department, they did not wish me to deal at any length with this problem—merely to note its obvious existence, as I now have. Since the terms of reference of my appointment do not include this issue, I shall take the matter no further unless requested to do so by the Court.

A further important issue was also withdrawn from discussion by the Department at the "retreat." I will merely mention what it was and avoid exegesis. Norman Carlson, John Rees, Michael Mahoney and I are all of the view that double celling in protective custody, at least to the same proportional extent that it exists in the general population, though undesirable, is not inappropriate given population pressures, and that it can be done without serious threat to security. The Department's position is that double celling does not fall within my terms of reference and they requested that I should not expand on the topic, though prior to the "retreat" I was being encouraged to deal with it.

As a final introductory comment let me add this: A prison in complete lock-down, while it is in lock-down, is a safe prison. Protective custody now at Stateville—which is not in lock-down but is very tightly controlled, with limited inmate interaction, and with rarely any substantial number of prisoners out of their cells at any one

time—is a relatively safe form of imprisonment, as indicated by the low indeces of assaults there as compared to the general population. As the plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another. Hence, failures of equal protection in one protective custody regime, as at present, risk being supplanted by failures sufficiently to protect the inmates one from another. The balance is neither obvious nor easy to strike. It is my view that the balance struck in the following proposed remedial plan avoids any failure of equal protection and yet provides for the establishment of constitutionally safe protective custody regimes at Stateville.

The proposal is arranged under the following headings:

Full and Limited Programs
Religion
Library (Law and General)
Education
Jobs and Pay
Food
Recreation
Cell Time and Association
Monitoring

Under each heading there is a proposal and a commentary. Where appropriate a cost estimate is included at the end of each commentary. The proposals are collected into a Proposed Remedial Order appended to this document.

Mr. Mahoney has authorised [sic] me to state that he is in express and detailed agreement with me in the proposed remedial plan and that he also agrees with the general tenor of the commentary.

Many have helped Mr. Mahoney and me in this task, but we both wish to express our particular gratitude to Mr. Leo Meyer, Warden O'Leary, Mr. Norman Carlson, Mr. John Rees, and Ms. Judy Cottle.

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